Supreme Court, U.S.
FILED

108

No. (1) 08-471

OCT 08 2008
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In the
Supreme Court of the United States

VENTURE INDUSTRIES CORPORATION,
Petitioner,

v.

AUTOLIV ASP, INC. (successor to Morton International, Inc.),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Erie* doctrine permit a federal district court to apply 28 U.S.C. §1961, the federal post-judgment interest statute, to override state substantive damages law where the application of state substantive law would not in any way disturb federal procedures?

2. Should this Court resolve a conflict between the Sixth Circuit and the Eleventh and Ninth Circuits as to whether Federal Rule of Appellate Procedure 37(b) permits a district court to determine interest on a judgment when it executes an appellate mandate that is silent on allowance of interest?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Venture Industries Corporation ("Venture") states that it is the only remaining plaintiff in the proceeding in the court whose judgment is sought to be reviewed ("the district court"). Venture is now known as the Bankruptcy Estate of NM Holdings ("Estate"), Stuart A. Gold Trustee.

The other parties appearing in the lower court caption as Plaintiffs have no interest in the judgment of the district court. Vemco, Inc. and Patent Holding Company were Plaintiffs in the district court, but they have been combined into Estate. Larry J. Winget was the 100% direct shareholder of Patent Holding Company and the 100% indirect shareholder of Venture and Vemco, Inc. Because of orders of the bankruptcy court in the proceeding filed by Venture, Winget has no further interest in these proceedings.

Respondent Autoliv ASP, Inc. ("Autoliv"), defendant in the district court, is the successor in interest to Morton International, which was formerly a named defendant in the district court. Autoliv's parent company, Autoliv, Inc., was also an original defendant in the district court.

Pursuant to this Court's Rule 29.6, Venture states that neither Venture nor the Estate has any parent corporation or any shareholder that owns 10% or more of its ownership interests.

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Venture Industries Corporation ("Venture") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals (the "2008 Appeal") (App. A) was issued on July 10, 2008 without opinion. The 2008 Appeal arose from three related orders of the U.S. District Court for the Eastern District of Michigan (Cohn, J.):

- Amended Order Regarding Satisfaction of Judgment entered November 14, 2007 (App. B), which is unreported;

- Order of November 9, 2007 (App. C), which is also unreported; and

- Order Regarding Prejudgment and Post-Judgment Interest, dated October 30, 2007 (App. D), which is unofficially reported at 2007 WL 3202821.

Two other orders of the district court are relevant to this Petition:

- Second Amended Final Judgment In A Civil Case, dated November 29, 2006 (App. E), which is unreported; and

- Amended Final Judgment In A Civil Case (App. F), which is also unreported.

The Federal Circuit also decided three other appeals in this case:

- *Venture Indus. Corp. v. Autoliv ASP Inc.*, Nos. 04-1486, 04-1488, 196 Fed. App'x 894 (Fed. Cir. August 7, 2006), (the "Damages Appeals") (App. G);

- *Venture Indus. Corp. v. Autoliv ASP, Inc.*, No. 05-1537, 457 F.3d 1322 (Fed. Cir. August 7, 2006), (the "First Rule 60 Appeal") (App. H); and

- *Venture Indus. Corp. v. Autoliv ASP Inc.*, No. 07-1118, 227 Fed. App'x 923 (Fed. Cir. July 11, 2007) (the "Second Rule 60 Appeal"). App. I.

The First Rule 60 Appeal and the Second Rule 60 Appeal are not germane to this Petition. The Damages Appeal, as explained below, is relevant to the Rule 37 issue raised herein.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. §1961, as relevant to this Petition, provides:

§1961. Interest

> **(a)** Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.[1]

Michigan Compiled Laws §600.6013 provides in relevant part:

> **600.6013. Interest rate on judgment; settlement**
>
> (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section.
>
> (6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).
>
> (8) [I]nterest on a money judgment recovered in a civil action is calculated at 6-month intervals

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[1] The full text of §1961 is set forth in the Appendix. App. J at 71a-72a.

> from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.[2]

Federal Rule of Appellate Procedure 37 provides:

> Rule 37. Interest on Judgment
>
> (a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.
>
> (b) When the Court Reverses. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

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[2] The full text of §600.6013 is set forth in the Appendix. App. J at 73a-78a.

STATEMENT OF THE CASE

This case presents two questions arising from a common situation in federal courts – the determination of interest damages and interest on judgments in diversity actions. The two questions are:

- *Which law applies*: In a case based on diversity jurisdiction, like this case, determining interest damages implicates questions of federalism, namely the relationship between the federal post-judgment interest statute, 28 U.S.C. §1961, and state statutes providing for interest damages at rates different from the federal rate. Because it is settled that state interest damages are a substantive remedy controlled by state law, overriding state law by applying the federal post-judgment statute where there is no prejudice to a significant federal procedural interest violates the *Erie* doctrine.

- *Which court decides*: When a case, like this case, has been remanded to a district court from a court of appeals, Federal Rule of Appellate Procedure 37(b) ("Rule 37(b)") allocates to the court of appeals the responsibility for determining the allowance of interest on the judgment. A determination of interest by the district court therefore violates Rule 37(b).

These two questions are intertwined in this case because the wrong court applied the wrong law and as a result deprived Venture of $4.75 million in compensation to which it is entitled under Michigan law.

Specifically, the Federal Circuit, applying Sixth Circuit law, summarily affirmed the district court's holding that interest on a $27 million jury verdict began accruing under federal law, rather than state law, over four years before Venture could collect its damages. In so holding, the decision ignored the narrow federal policy underlying §1961 and thereby created an unnecessary collision between federal law and Michigan's substantive law on interest damages. That collision violates the constitutional principles of federalism established by this Court's *Erie* jurisprudence. In addition, the Federal Circuit applied Sixth Circuit precedent that ignores the clear dictates of Rule 37 and thereby renewed an existing conflict between the Sixth Circuit and the Eleventh and Ninth Circuits.

If the decision is allowed to stand, winners in federal court like Venture will be deprived of damages due them under state substantive law, while losers like Autoliv will receive a commensurate windfall and will enjoy an enhanced perverse incentive to pursue meritless appeals. Moreover, the decision below, by allowing a district court to make a determination expressly reserved to appellate courts, will engender needless litigation in the district courts and unnecessary appeals concerning interest questions that should and could have been resolved by the appellate court in the first instance.

A. The Underlying Dispute.

This proceeding arose out of a dispute between Autoliv, a "Tier One" supplier of automobile parts and Venture, a supplier to Autoliv, over patent rights and

contract rights relating to the manufacture and sale of airbag module covers that Autoliv had agreed to purchase from Venture. Venture filed suit in the U.S. District Court for the Eastern District of Michigan in 1999, alleging federal question jurisdiction over its patent claims and diversity jurisdiction over its contract claims. (The patent claims were later severed, arbitrated and settled). In December 2003, a jury awarded Venture $27,576,001 in damages on its state-law contract claims. On April 7, 2004, the district court entered an amended judgment, retroactively effective to December 4, 2003, in the amount of $33,459,134.84, which included $5,878,972 in interest damages as provided under Michigan law. App. F.[3]

B. The Damages Appeals.

Autoliv appealed the jury verdict on the ground that damages were excessive (App. K), and Venture cross-appealed as to the amount of interest damages appropriate under Michigan law (App. L). Because the case originally involved patent rights, the appeals were pursued in the Federal Circuit. App. M.

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[3] Michigan law does not explicitly provide for pre-judgment or post-judgment interest. Rather §6013(1) generally provides "Interest is allowed on a money judgment recovered in a civil action as provided in this section." Section 6013(8), which applies in this case, specifies a beginning date for interest, but no end date. The Michigan Supreme Court has construed the statute to provide for accrual of interest until a judgment is satisfied. *Gordon Sel-Way, Inc. v. Spence Bros, Inc.* 438 Mich. 488, 475 N.W.2d 704, 716 (1991)

In August 2006, the Federal Circuit issued its opinion on the Damages Appeals. The court affirmed the jury verdict, but remanded for a re-calculation of interest damages because Michigan law provided that interest damages commenced with the filing of the complaint:

> We, therefore, vacate the district court's calculation of prejudgment interest and remand the case to the district court to re-calculate the prejudgment interest consistent with this opinion, and subject to the outcome of the remand proceedings in the companion case.

App. H at 44a. The Judgment of the Federal Circuit in the Damages Appeals stated only, "Affirmed in part, vacated in part, and remanded." App. N.

After remand, the district court recalculated interest using the appropriate commencement date under Michigan law. On November 29, 2006, the court entered a Second Amended Final Judgment (App. E) in the amount of $34,482.413.34. That judgment increased interest damages from those included in the first amended judgment by over $1 million.

C. The Dispute Over Interest Damages And the 2008 Appeal.

In September 2007, after the Federal Circuit affirmed the district court's second denial of Autoliv's post-judgment Rule 60(b) motion, Autoliv paid $36,263,015.50 into the registry of the district court and sought an order that it had satisfied the Second Amended Final Judgment. Venture then moved the

district court for an order determining the amount of interest damages to be included in the final judgment. Venture's position was that interest damages accrued under Michigan law until the date of the Federal Circuit mandate in September 2007. Autoliv contended that state interest damages ceased on the date of the jury verdict in December 2003, almost four years earlier.

After a hearing, the district court issued an order on October 30, 2007 (App. D) adopting Autoliv's position and concluding that state interest damages were payable through December 4, 2003, the date of the original jury verdict. It then issued an Order which stated that the final amount of the Judgment was $36,418,483.50. App. C at 6a, ¶ 1. That amount was $4.75 million less than the amount that would have been due if interest had accrued as provided under Michigan law. App. O.

REASONS FOR GRANTING THE PETITION

I. THE *ERIE* DOCTRINE REQUIRES FEDERAL COURTS TO APPLY STATE SUBSTANTIVE DAMAGES LAW WHEN DOING SO DOES NOT CREATE A DIRECT CONFLICT WITH A FACIALLY APPLICABLE FEDERAL PROCEDURAL STATUTE.

A. Erie Requires Federal Courts Sitting In Diversity To Apply State Substantive Law In The Absence Of A Direct Conflict With Federal Procedural Law.

This Petition presents the Court with an opportunity to clarify that state substantive law

regarding interest damages applies in a diversity action despite the federal post-judgment interest statute (28 U.S.C. §1961) because application of state law will not interfere with the administration of federal proceedings and because the policies underlying the federal and state statutes are identical.

A federal court in a diversity action must, as a general matter, apply substantive state law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (determining that neither Congress nor a federal court has the authority to override substantive state law in diversity cases). For example, *Erie* requires application of state statutes providing for interest damages accruing before judgment. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Federal courts have generally held, however, that 28 U.S.C. §1961 governs a plaintiff's right to post-judgment interest in a diversity action. *See* Wright, Miller & Cooper, 19 *Federal Practice and Procedure* § 4511, n. 124. This Court has not, however, reached this issue.

Lower courts applying §1961 to state law claims generally do so on the perceived authority of *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). They construe *Hanna* to provide that the federal law trumps state law with which it directly "collides" as long as the federal law can be rationally construed as procedural, i.e., as a constitutional exercise of congressional power under Article III or the Necessary and Proper Clause. *See, e.g., Bailey v. Chattem, Inc.*, 838 F.2d 149, 152-153

(6th Cir. 1988).[4] Where, however, a state statute provides that interest accrues both before and after judgment, the federal interest is already protected, any conflict between § 1961 and the state law is illusory, and there is no direct "collision" between § 1961 and the state law.

Awards of pre- and post-judgment interest, therefore, do not involve the type of direct collision between *procedural* rules addressed by *Hanna v. Plumer*, 380 U.S. 460 (1965) (conflicting methods of service under Federal Rule of Civil Procedure 4 and Massachusetts state law), or *Burlington R.R. Co. v. Woods*, 480 U.S. 1 (1987) (Alabama mandatory affirmance penalty that conflicted with Federal Rule of Appellate Procedure 38). Instead, an award of post-judgment interest implicates only what this Court recognized in *Hanna* as "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468. Unlike the situation in *Hanna*, applying state law instead of §1961 to impose substantive damages does not interfere with the "housekeeping rules for federal courts." *Id.* at 473 ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules").

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[4] In the abstract, of course, §1961 is constitutional because it is intended to compensate a prevailing plaintiff for the loss of use of the judgment. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 834-35 (1990) (stating policy underlying §1961).

B. The Lower Courts' Simplistic Application of §1961 Ignores The Fundamental Underlying *Erie* Problem.

Many state laws provide for pre- and post-judgment interest on contract claims like those involved in this case. Most federal courts apply §1961 in these cases without analyzing the implicit *Erie* issue.[5] Instead they simply determine the date at the rate at which interest is calculated switches from state law to federal law. For example, in this case, the district court rejected Venture's *Erie* argument and looked to federal law, as declared in *Kaiser, supra*, to determine the date at which damages were meaningfully ascertained and, therefore, the date on which interest was calculated at the federal post-judgment rate. App. D at 12a-14a.[6]

Viewing the application of §1961 through the prism of *Kaiser*, however, masks the fundamental *Erie* issue because *Kaiser* involved only federal antitrust claims. In contrast, the fundamental choice of law issue in a diversity case is to determine whether federal law or state law should be applied to compensate the plaintiff

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[5] Another group of circuit court decisions applying §1961 in diversity actions awards post-judgment interest in tort and other cases where no pre-judgment interest is available under state law. This case and this petition do not implicate any *Erie* issues presented by that group of cases.

[6] *See, e.g., Forest Sales Corp. v. Bedingfield*, 881 F.2d 111, 111-13 (4th Cir. 1989); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 622-24 (5th Cir. 1988); *Weitz Co. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385-87 (8th Cir. 1983); *Everaard v. Hartford Accident & Indem. Co.*, 842 F.2d 1186, 1193-94 (10th Cir. 1988).

for damages inflicted by the defendant under state law. In a diversity case, federal law may inform the calculation issue in this fashion, but it is state law and state law only that may determine the amount of interest damages recoverable.

C. Review By This Court Will Provide Needed Guidance On The Application of *Hanna*.

As Justice Harlan's concurrence in *Hanna* demonstrates (380 U.S. at 474 ff.), the *Hanna* "collision" test is not a final resolution of the *Erie* problem, even when a federal statute is arguably applicable. *Hanna* leaves a large gray area in which the application of otherwise constitutional federal statutes will adversely affect state law substantive rights. *See,* Wright, Miller & Cooper, 19 *Federal Practice & Procedure* § 4508 at n74 (2008). If the federal statute at issue "properly construed does not truly comprehend the disputed issue, then the decision as to whether federal or state law governs must be made with reference to the Rules of Decision Act and the Erie doctrine." *Id.* at n. 77. In short, *Hanna* was never intended to override state substantive law in diversity actions where application of state substantive law does not prejudice a procedural or "housekeeping" function of the federal court system.

Although this Court has re-visited *Hanna* only rarely in the last four decades, its decisions demonstrate that *Hanna*'s deference to federal law other than the Civil Rules must be addressed on a case-by-case basis. *Burlington Northern, supra*, offers a typical example and suggests that §1961 should not

trump state interest damages statutes. First, the Court recognized that the *Hanna* test is not absolute:

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. See *Hanna, supra,* at 464-465, 85 S.Ct., at 1140.[7]

480 U.S. at 5.

Second, the Court drew a distinction between state laws that govern substance and the process affected by the state statute at issue:

> The choice made by the drafters of the Federal Rules in favor of a discretionary procedure *affects only the process of enforcing litigants' rights and not the rights themselves.*

480 U.S. at 8 (emphasis added). Thus, *Burlington Northern* teaches that *Hanna*'s deference to federal procedural law applies only after the court determines that the state/federal collision is procedural and not substantive.

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[7] *Burlington Northern* considered whether an Alabama statute that penalized unsuccessful appeals conflicted with Federal Rule of Appellate Procedure 38.

Another good example of the limitations of the *Hanna* deference to federal law is *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996), which considered a collision between a New York statute governing review of allegedly excessive damage awards and the Seventh Amendment guaranty to a jury trial. After reviewing post-*Erie* decisions, the Court phrased the issue as whether the New York statute would be "outcome affective" (*id.* at 428) or, in *Hanna*'s terms, "whether application of the [State's] rule would make so important a difference as to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the foreign state . . .". *Id.* at 428, n. 8.[8]

Measured against this standard, the New York statute contained both a "procedural instruction" and a "manifestly substantive" objective which, if applied literally in federal court, would be "out of sync" with the federal system's division of trial and appellate court functions, an allocation weighted by the Seventh Amendment." *Id.* at 426. The Court therefore held:

> It thus appears that if federal courts ignore the [state statute] and persist in applying [the federal standard] to damage awards on claims governed by New York law, "'substantial' variations between state and federal [money judgments" may be expected. See *Hanna*, 380

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[8] *Gasperini*'s analysis necessarily limits *Hanna's* narrow holding to cases involving a direct collision with a Federal Rule of Civil Procedure. *Id.* 427, n. 7. Any other reading of the case would ignore the fact that the collision with state law arose under the federal Constitution.

> U.S. at 467-468, 85 S.Ct. at 1142. We therefore agree with the Second Circuit that New York's check on excessive damages implicates what we have called *Erie*'s "twin aims." See *supra* at 2220. Just as the *Erie* principle precludes a federal court from giving a state-created claim "longer life . . . than [the claim' would have had in the state court," *Ragan [v. Merchants Transfer & Warehouse Co.]*, 337 U.S. at 533-534, 69 S.Ct. at 1235, **so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.**

Id. at 430 (emphasis added and footnotes omitted). The present case, of course, is simply the flip side of *Gasperini*. In *Gasperini*, federal law increased the plaintiff's recovery over that permitted by state law; here, federal law reduced the plaintiff's recovery. In either situation, *Erie* demands that that the federal court respect and apply state law.[9]

D. This Case Presents An Excellent Vehicle For Addressing The *Erie* Issue In The Context Of A Federal Statute That Potentially Implicates Both Substance and Procedure.

The district court in this case applied §1961 to deprive Venture of damages due it under §600.6013 of

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[9] Interestingly, the Court proceeded in *Gasperini* to hold that the federal interest in the administration of the federal court system could be protected by holding that the district court, not the appellate court, should apply the appropriate state standard.

the Michigan Statutes. According to the district court, §1961 required calculation at the lower federal rate from the date of the jury verdict in 2003. In contrast, §6013 unambiguously provides for interest at the higher state rate from the date Venture filed its complaint in 1999 until the date Autoliv satisfied the judgment in 2007. *Morales v. Auto-Owners Ins. Co.*, 469 Mich. 487, 672 N.W.2d 849, 852 (2003) (§600.6013 requires payment of interest prior to judgment); *Gordon Sel-Way, Inc. v. Spence Bros, Inc.* 438 Mich. 488, 475 N.W.2d 704, 716 (1991) (interest accrues under §600.6013 until satisfaction of judgment).

There is no "collision" between the procedural/housekeeping aspects of §1961 and this Michigan substantive law because both statutes address and advance the same policy. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 834-35 (1990) explains the federal policy:

> [T]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant.

That policy is the same as Michigan's policy. *Gordon Sel-Way, supra,* 475 N.W.2d 704, 716 (1991). So the only "collision" between federal and state law in this case is that the district court applied §1961 to deprive Venture of compensation to which it is entitled under state law. Since the only impact of applying federal law is to create a difference in the amount of the judgment that Venture received in federal court compared to what Venture should have received in

state court, *Erie* and *Gasperini* preclude application of §1961.

II. THERE IS A CONFLICT BETWEEN CIRCUITS AS TO THE APPLICATION OF FEDERAL RULE OF APPELLATE PROCEDURE 37.

A. Rule 37(b) Precludes A District Court From Determining Interest Damages When The Remand Is Silent.

Rule 37(b) is derived from *Briggs v. Penn. R.R. Co.*, 334 U.S. 304 (1948). *Briggs* held that a district court is powerless to apply the federal interest statute, where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate. 334 U.S. at 306.

The Advisory Committee comment to Rule 37 expressly states that Rule 37(b) "is a reminder to the court, the clerk and counsel of the *Briggs* rule." The Federal Circuit, however, ignored that reminder in this case. Instead, the court of appeals found that the district court had committed no error of law in awarding post-judgment interest under federal law even though the appellate court had not directed it to do so. Applying the law of the Sixth Circuit to the orders of the district court, the Federal Circuit accepted the district court's reliance on *Bailey v. Chattem, Inc.*, 838 F.2d 149, 151 (6th Cir. 1988), to override Michigan substantive law in favor of §1961. App. D at 12a.

Bailey, however, reflects a judicial approach that contradicts Rule 37(b). In that case, the Sixth Circuit had vacated the original verdict for the plaintiff and then, on a second appeal, affirmed a more favorable verdict for the plaintiff. After the second remand, the plaintiff moved the trial court to recalculate interest damages. When that motion was denied, the plaintiff appealed. The Sixth Circuit rejected the defendant's argument that a trial court has no authority to determine interest damages on remand in the absence of a mandate directing that determination. *Id.* at 151. The court held that the trial court had properly determined interest on the judgment even though the mandate had been "appropriately silent on the matter of interest." *Id.* That holding violated Rule 37(b): When the remand mandate is silent about post-judgment interest, "the district court has no choice but to begin post-judgment interest with entry of the post-remand judgment." 20A *Moore's Fed. Prac.* § 337.12 (2008); 16A Wright, Miller & Cooper, *Fed. Prac. & Proc.* § 3983 (2008).

B. Sixth Circuit Law Conflicts With The Law of The Eleventh and Ninth Circuits.

The law of the Sixth Circuit, as articulated in *Bailey* and applied by the Federal Circuit in this case, irreconcilably conflicts with the application of Rule 37(b) in the Eleventh Circuit, as declared in *Seb S.A. v. Sunbeam Corp.*, 476 F.3d 1317, 1320 (11th Cir. 2007). The facts in *Seb* were identical to those in this case. The defendant had appealed a jury verdict in favor of the plaintiff, and the plaintiff had cross-appealed for more interest damages. The Eleventh Circuit affirmed the jury verdict but remanded for an

award of more interest. On remand, the district court entered an amended judgment, in which it corrected its error as to prejudgment interest. The district court also determined that pre-judgment interest ceased to accrue and post-judgment interest began to accrue on the date of its original judgment. The plaintiff, however, objected that Florida law required that pre-judgment interest accrue until the date of the post-remand amended judgment and that Federal Rule of Appellate Procedure 37 required that post-judgment interest begin to accrue on that date.

As here, the plaintiff appealed. Unlike this case, however, the Eleventh Circuit reversed. The court stated:

> To resolve this appeal, we must address two matters: first, under Federal Rule of Appellate Procedure 37, when postjudgment interest began to accrue; and second, whether prejudgment interest accrued until that date.

On the first issue, the court held:

> Because we did not provide instructions in our mandate or opinion regarding postjudgment interest, the district court had no choice but to begin postjudgment interest on the date of its amended judgment. When the district court determined that postjudgment interest instead began on the

> date of its original judgment, it exceeded the scope of its authority under Rule 37.[10]

The court then held interest must accrue until the last remand.:

> Because we did not provide instructions in our mandate or opinion regarding postjudgment interest, the district court had no choice but to begin postjudgment interest on the date of its [post-remand] judgment. ***When the district court determined that postjudgment interest instead began on the date of its original judgment, it exceeded the scope of its authority under Rule 37.***

Id. at 1320 (emphasis added). Thus, *Seb* is in direct conflict with the decision below where state law interest was terminated over four years before the last remand.

The Ninth Circuit has adopted the same rule. In *Planned Parenthood of Columbia / Willamette Inc. v. American Coalition of Life Activists,* 518 F.3d 1013, 1015, 1016 (9th Cir. 2008), the Ninth Circuit rejected a

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[10] *Accord National Fire Ins. Co. of Hartford v. Fortune Const. Co.*, 233 Fed. Appx. 890, 895 (11th Cir. 2007). The same result was reached in *Tronzo v. Biomet, Inc.*, 318 F.3d 1378, 1381-82 (Fed. Cir. 2003), in which the Federal Circuit, applying 11th Circuit law, held that, upon an "appellate lapse" in failing to include a direction as to interest in a remand mandate, the dispute as to interest was not presented to the district court, but rather the aggrieved party was required to apply to the appellate court for relief.

claim that the district court could award post-judgment interest from the date of the original jury verdict after the court of appeals had reduced a punitive damages award and remanded for the district court to order a new trial unless the plaintiffs accepted a remittitur. The court succinctly expressed its holding as follows:

> We hold that our failure to specify the accrual date for post-judgment interest in our mandate precluded the district court's order that interest would run from the date of the original judgment.

Id. This holding, like the Eleventh Circuit's holding in *Seb,* is in direct conflict with the Sixth Circuit rule adopted in *Bailey* and applied in this case.

III. THE PETITION PRESENTS ISSUES OF NATIONAL SIGNIFICANCE.

A. Overriding State Law and Rule 37 Creates Perverse Incentives to Losing Defendants in Diversity Cases to Appeal.

The conflict between the decision below and *Erie* and the conflict between the Circuits on the application of Rule 37 raise important issues of judicial administration in the federal courts.

Erie. Although federal courts address *Erie* issues in virtually every diversity case, they have received little guidance from this Court in the last four decades concerning the key substance versus procedure distinction. As a result, the lower federal courts have

pursued an approach to *Hanna* that blindly validates every application of arguably procedural federal statutes. This Court should intercede to restore the proper relationship between state substance law and federal procedural law.

Rule 37(b). Permitting trial courts to address interest damages issues that should have been resolved by the court of appeals before remand, as *Bailey* and the decision here condone, only encourages additional appeals. The present case offers a perfect example of the perverse incentive created by failure to apply Rule 37 properly. Autoliv had every reason to prosecute three unsuccessful appeals in this case because interest accruing during that appeal was less than its cost of capital. While neither §1961 or § 600.6013 totally eliminates that windfall, application of Michigan law at least reduces the windfall and the concomitant harm to Venture – the district court's decision deprived Venture of $4.75 million in interest to which Venture is entitled under Michigan law. That deprivation does not advance any federal policy.

B. Further Percolation Is Not Necessary To Resolve the Questions Presented.

The conflict between the decision below and *Erie* is patent. The narrow issue presented is simply whether *Erie* permits a federal court sitting in diversity to apply federal judge-made law (*Kaiser, supra*) to override state substantive law where the application of state substantive law would not contravene the federal interest in unfair procedures for federal courts and where both state and federal law seek the same policies. The clarity of this issue in this case offers the

Court an excellent opportunity to address an *Erie / Hanna* collision for the first time since *Gasperini* in a context where federal court housekeeping concerns do not conflict with state substantive law.

The conflict between the Circuits on the application of Rule 37 is also ripe for review. The court of appeals decisions cited above articulate the relevant issues and policies, and there is nothing to be gained by condoning the failures of circuit court panels to fulfill their responsibilities under Rule 37(b) or to permit trial courts to usurp those prerogatives.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Dated: October 8, 2008

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2008-1113

[Filed July 10, 2008]

VENTURE INDUSTRIES CORPORATION,

Plaintiff-Appellant,

and

VEMCO, INC., PATENT HOLDING COMPANY, and LARRY J. WINGET,

Plaintiffs,

v.

AUTOLIV ASP, INC. (successor to Morton International, Inc.),

Defendant-Appellee.

John E. Anding, Drew Cooper & Anding, of Grand Rapids, Michigan, argued for plaintiff-appellant. With

him on the brief were *Thomas V. Hubbard* and *Theodore J. Westbrook*.

Cyrus Amir-Mokri, Skadden, Arps, Slate, Meagher & Flom LLP, of New York, New York, argued for defendant-appellee. With him on the brief was *Peter E. Greene*.

Appealed from: United States District Court
for the Eastern District of Michigan

Senior Judge Avern Cohn

Judgment

ON APPEAL from the United States District Court for the Eastern District of Michigan

in CASE NO(S). 99-CV-75354

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (DYK, PROST, and MOORE, *Circuit Judges*).

AFFIRMED. *See* Fed. Cir. R. 36.

DATED July 10, 2008

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
Jan Horbaly, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 99-75354

[Filed November 14, 2007]

VENTURE INDUSTRIES CORPORATION, et al.,	)
Plaintiffs,	)
v.	)
AUTOLIV, INC., et al.,	)
Defendants.	)

Honorable Avern Cohn

AMENDED ORDER REGARDING SATISFACTION OF JUDGMENT

Autoliv ASP, Inc. has fully, finally and completely satisfied the Judgment in the above-entitled case, in the amount of $36,418,483.50.

SO ORDERED

Dated: November 14, 2007

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 99-75354

[Filed November 9, 2007]

VENTURE INDUSTRIES CORPORATION, et al.,	)
Plaintiffs,	)
v.	)
AUTOLIV, INC., et al.,	)
Defendants.	)

Honorable Avern Cohn

ORDER

The parties having brought various matters before the Court, which were heard on October 25, 2007, and the Court being fully advised in the premises;

IT IS ORDERED AS FOLLOWS:

1. The final amount of the Judgment in the above-captioned action is $36,418,483.50, inclusive of all interest and costs.

2. The Second Amended Judgment dated November 29, 2006 is, for the reasons stated upon the record at a hearing before this Court on October 25, 2007, corrected to read "plaintiff Venture Industries Corporation" instead of "plaintiffs", the latter entry being a ministerial error.

3. Pursuant to Fed. R. Civ. P. 67, Autoliv ASP, Inc. ("Autoliv") is granted leave to deposit the sum of $155,468 into the interest-bearing account established by the Court's October 3, 2007 Order, pursuant to which Order Autoliv has already paid $36,263,015.50 towards final payment of the full amount of the judgment in this case. Withdrawals from the account shall be by order of the Court. The Clerk shall deposit the funds in a money market account at the prevailing rate of interest at a federally approved financial institution. The Clerk shall deduct any administrative registry fee set by the Director of the Administrative Office of the U.S. Courts and authorized by the Judicial Conference of the United States from the interest earned on the funds without further order of the Court.

4. Upon depositing $155,468 with the Court, Autoliv will have fully and completely satisfied the judgment in the above-captioned action, including all interest and costs, and the Letter of Credit No. SLT410035, issued by JPMorgan Chase Bank, N.A. on March 3, 2004 (amended on November 10, 2006) on behalf of Autoliv in this action, shall become *functus*

officio and shall forthwith be returned by Venture to Autoliv.

SO ORDERED.

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: November 9, 2007

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, November 9, 2007, by electronic and/or ordinary mail.

s/Julie Owens
Case Manager, (313) 234-5160

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 99-75354

[Filed October 30, 2007]

VENTURE INDUSTRIES CORPORATION, VEMCO, INC., PATENT HOLDING COMPANY, and LARRY J. WINGET,	)
Plaintiffs,	)
v.	)
AUTOLIV ASP, INC.,	)
Defendant.	)

Hon: AVERN COHN

ORDER REGARDING PREJUDGMENT AND POST-JUDGMENT INTEREST

I. Introduction

This is a contract case tried to a jury and affirmed on appeal. Before the Court is plaintiffs,[1] Venture Industries Corp., Vemco, Inc., Patent Holding Company, and Larry J. Winget (collectively, Venture), motion to determine prejudgment interest.[2] Venture seeks a ruling that prejudgment interest is calculated from November 3, 1999, the date the complaint was filed, through September 27, 2007, the date the mandate issued from the Court of Appeals for the Federal Circuit on Autoliv's second appeal.[3]

Defendant Autoliv, Inc. (Autoliv) says that prejudgment interest runs from November 3, 1999 to December 4, 2003, the date the Court entered a judgment on the jury verdict and that *post-judgment* interest begins thereafter.

For the reasons that follow, Venture is entitled to prejudgment interest from November 3, 1999 to December 4, 2003, which has already been calculated

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[1] At the hearing on Venture's motion to determine prejudgment interest, the parties agreed that the sole plaintiff is Venture. The Court directed the parties to submit a proposed order to that effect. Since the proposed order has not yet been received or entered, the case captions contains all of the named plaintiffs.

[2] Also before the Court is Venture's motion for reconsideration of the Court's October 3, 2007 Order regarding Autoliv's letter of credit. That motion is the subject of a separate order.

[3] The desire to have such an expansive period of prejudgment interest is not surprising as prejudgment interest rates are significantly higher than post-judgment interest rates.

as $6,902,251.00. Venture is entitled to post-judgment interest thereafter.

II. Background

On November 3, 1999, Venture sued Autoliv for failing to allow Venture to supply air bag covers to Autoliv in breach of an agreement. The jury returned a verdict in favor of Venture. On December 4, 2003, the Court entered a judgment on the jury verdict in the amount of $27,576.001.00. Venture then filed a motion to amend the judgment in part to include prejudgment interest. On April 7, 2004, the Court entered a Memorandum and Order on Prejudgment Interest, awarding Venture prejudgment interest in the amount of $5,878,972. The Memorandum stated that an amended judgment would enter "*nunc pro tunc* December 4, 2003." That same day, the Court entered an Amended Final Judgment including the amount of the jury verdict plus prejudgment interest and costs. The Amended Final Judgment also stated that it was "*nunc pro tunc* December 4, 2003 for purposes of computing interest."

Autoliv appealed from the jury's verdict and the Court's denial of its Rule 60(b) motion. Venture cross-appealed on the issue of the manner of calculating prejudgment interest. Venture argued that prejudgment interest should accrue at the date of filing the complaint. On August 7, 2006, the Court of Appeals for the Federal Circuit separately issued its decisions on Autoliv's appeal and Venture's cross appeal. As to Venture's cross-appeal, the Federal Circuit agreed with Venture and vacated the Court's calculation of prejudgment interest and directed that

the start date for prejudgment interest was the filing of the complaint. As to Autoliv's appeal, the Federal Circuit vacated and remanded for consideration Autoliv's motion for a new trial under Rule 60(b)(3).

Accordingly, on November 29, 2006, the Court entered an Order Amending Judgment, calculating prejudgment interest from the date the complaint was filed. The Order stated that "Prejudgment interest has been recalculated as required, and is $6,902,251.00 as of December 4, 2003." On that day, the Court also entered a Second Amended Final Judgment to reflect the difference in prejudgment interest. The Second Amended Judgment, like the Amended Judgment, stated that it was "*nunc pro tunc* December 4, 2003 for purposes of computing interest." Venture did not take an appeal from this judgment.

Meanwhile, the Court considered Autoliv's Rule 60(b)(3) motion in accordance with the Federal Circuit's decision. On November 29, 2006, the Court denied Autoliv's motion. Autoliv again appealed. On July 16, 2007, the Federal Circuit affirmed the Court's decision. The mandate issued on September 27, 2007.

III. Analysis

A.

Venture argues that interest from the time the complaint was filed until the mandate issued should be considered *prejudgment* interest. Autoliv says that prejudgment interest runs from the time the complaint was filed until December 4, 2003; thereafter, interest accruing is considered *post-judgment* interest. Thus,

the issue is what affect, if any, is the December 4, 2003 judgment under the circumstances.

The Michigan statute regarding prejudgment interest states that "interest on a money judgement recovered in a civil action is calculated ... from the date of filing the complaint ... on the entire amount of the money judgement, including attorney fees and costs." M.C.L. § 600.6013(8). Under this statute, prejudgment interest must be calculated on the entire judgment from the date that the complaint was filed. *Perceptron, Inc. v. Sensor Adaptive Machs., Inc.*, 221 F.3d 913, 923 (6th Cir. 2000)

While prejudgment interest is determined by reference to state law, the Court of Appeals for the Sixth Circuit has made clear that "the question of which judgment should be used to trigger interest is a matter of federal law." *Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 954 F.2d 1263, 1274 (6th Cir. 1992) (citing *Bailey v. Chattem, Inc.*, 838 F.2d 149, 152 (6th Cir. 1988). Thus, the date for determining the line between pre and post judgment interest is controlled by federal law. 28 U.S.C. § 1961 states:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated from the date of the entry of the judgment....

In *Kaiser Aluminum & Chem. Corp v. Bonjorno*, 494 U.S. 827 (1990), the Supreme Court held that the trigger date for the accrual of post judgment interest is the date of the judgment in which damages have "been ascertained in a meaningful way." *Id.* at 836. In

Kaiser, the district court set aside the jury's initial findings on damages, holding that they were not supported by the evidence. A new judgment was entered after a limited re-trial. *Id.* at 830. The Supreme Court concluded that since the first trial was not supported by the evidence, it did not represent a meaningful assessment of the damages. Thus, post-judgment interest began to accrue after entry of the second judgment. *Id.* at 836.

Subsequent cases in the Sixth Circuit adhere to this rule. Following *Kaiser*, the Sixth Circuit in *Coal Resources*, *supra*, held that the post-judgment interest began on the date of the original judgment because the original award had not been vacated on appeal even though it has been reduced by the court-ordered remittitur. The damages were meaningfully ascertained from the original judgment. *Id.* at 1274-1275. In *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413 (6th Cir. 1990), the plaintiffs received an award following a trial and a judgment entered in their favor. The Sixth Circuit vacated and remanded the case for a new trial because of an error of law. After a re-trial, plaintiffs again prevailed. Plaintiffs argued that post-judgment interest accrued as of the date of the original judgment. The district court disagreed and awarded post-judgment interest from the date of the judgment after the second trial. The Sixth Circuit affirmed, noting that the damages were meaningfully ascertained after the second judgment since the original judgment was vacated. *Id.* at 1447. *See also Adkins v. Asbestos Corp., Ltd.*, 18 F.3d 1349, 1352 (6th Cir. 1994) (post-judgment interest runs from the "date of any judgment that is not entirely set aside"); *Skalka v. Fernald, Envtl.*

Restoration Mgmt. Corp., 178 F.3d 414, 429 (6th Cir. 1999) (damages suffered by the plaintiffs were meaningfully ascertained after the second trial since original judgment was vacated in its entirety on the first appeal).

Here, the damages amount reflected in the jury verdict as stated in the December 4, 2003 judgment has never been set aside. All subsequent judgments were specifically entered "*nunc pro tunc* December 4, 2003 for purposes of computing interest." Therefore, the appropriate date for determining when damages were meaningfully ascertained and triggering the post-judgment period is December 4, 2003. The essential damages portion of the judgment - the jury verdict - has never been modified, vacated, or rendered incomplete at any time since the date of entry.

Likewise, Venture's argument that prejudgment interest should be calculated through at least the November 29, 2006 Second Amended Judgment is unavailing because that judgment, like the Amended Judgment, was entered *nunc pro tunc* December 4, 2003.

B.

Venture, however, takes the position that prejudgment interest accrues until the date the Federal Circuit issued its mandate following Autoliv's second appeal from the denial of its Rule 60(b) motion. In support, Venture cites Michigan cases which it says provide authority for the proposition that prejudgment interest accrues during "prejudgment appellate delay." *Ayar v. Foodland Distrib.*, 472 Mich. 713, 716-17

(2005); *Morales v. Auto-Owners Ins., Co.*, 469 Mich. 487, 491-92 (2003). Venture also cites a federal case interpreting Michigan law on the issue of prejudgment interest, *Wrench LLC v. Taco Bell Corp.*, 290 F. Supp. 2d 821 (W.D. Mich. 2003).

Venture's reliance on these cases is wholly misplaced. First, *Ayar* involved the issue of when prejudgment interest accrues on an award of costs and mediation sanctions which the Michigan Court of Appeals held begins at the time the complaint was filed. It did not address the issue of prejudgment interest running during the appellate process. Thus, *Ayar* provides no support for Venture's argument.

In *Morales*, the plaintiff/insured sued defendant/insurer seeking no-fault coverage following an accident. The trial court granted the insurer's motion for summary disposition. The Michigan Court of Appeals affirmed. The Michigan Supreme Court reversed and remanded the case for trial. *Morales v. Auto-Owners*, 458 Mich. 288 (1998). After a trial, a jury found for the plaintiff. The trial court entered a judgment on the jury verdict and awarded prejudgment interest for the entire period, including the time the case was on appeal. The Michigan Supreme Court affirmed the trial court's calculation of prejudgment interest, noting that "the statute [M.C.L. § 6000.6013(8) makes no exception for periods of prejudgment appellate delay." 469 Mich. at 852.

In *Wrench*, the plaintiffs sued defendant claiming breach of implied contract and various torts related to defendant's alleged use of their ideas relating to a cartoon character. The district court originally granted

summary judgment to defendant. Plaintiffs appealed. The Court of Appeals for the Sixth Circuit reversed and remanded the case for trial on several claims. *Wrench v. Taco Bell LLC*, 256 F.3d 446 (6th Cir. 2001). After a trial, a jury found in favor of plaintiffs and the district court entered an amended judgment. The district court then awarded plaintiffs prejudgment interest from the time the complaint was filed to the date of entry of an amended judgment awarding interest, which encompassed the time the case was on appeal.

What Venture fails to appreciate, or perhaps failed to discover, is that both *Morales* and *Wrench* involved the situation where the initial judgment was for the defendant and it was only *after* an appeal and reversal that the case went to trial and a judgment entered in favor of the plaintiffs. In that circumstances, an award of prejudgment interest during the appeal process is consistent with Michigan law on prejudgment interest because the plaintiff did not obtain a judgment in their favor until after the appeal. It is also consistent with federal law on post-judgment interest because it was only after the appellate process that the damages, *i.e.* a jury verdict, was "meaningfully ascertained." Here, however, Venture obtained a judgment in their favor at trial *before* an appeal. Holding that the dividing line for pre-judgment and post-judgment interest is the date of entry of judgment in Venture's favor, December 4, 2003, is consistent with *Morales* and *Wrench*. Moreover, it is noted that *Wrench* did not cite the Supreme Court's decision in *Kaiser* or any of the Sixth Circuit decisions addressing the line between pre and post-judgment interest.

C.

In its reply brief, Venture cites *Scotts v. Central Garden & Pet Co.*, 403 F.3d 781 (6th Cir. 2005) to support its argument that "the latest judgment should be used as the stop date for state-law prejudgment interest and start date for post-judgment interest." In *Scotts*, the plaintiff/manufacturer (Scotts) sued defendant, its distributor (Central), for breach of contract and quasi contract. Central filed counterclaims for breach of contract. In May of 2002, the jury returned a verdict in favor of Scotts for $22.5 million and a verdict in favor of Central for $12.075 million. The verdict in favor of Scotts was based entirely on its breach of contract claim. The verdict in favor of Central was composed of four parts, one part being an award of $750,000.00 for breach of contract on an incentive-compensation issue. On May 16, 2002, the district court entered a judgment on the jury's verdict. The judgment, as stated in the district court's docket sheet entry, provided as follows:

> An award of $22,500.00 [sic] in favor of plf Scotts on its claim against dft Central Garden for breach of contract. An award of $7,700,000 in favor of dft counter-plf Central Garden on its claim against Scotts for breach of contract for pymt of agency fees; an award of $3,275,000 in favor of Central Garden on its claims against Scotts for excess shipments; an award of $750,000 in favor of Central Garden on its claim against Scotts for breach of contract for incentive compensation; and an award of $350,000 in favor of Central Garden on its claim against Scotts for Miracle Gro subject to the

> right of return, which yields a total award of $12,075,000 in favor of dft Central Garden against plf Scotts as to all of Central Garden counterclaims (cc: all counsel) (no pgs: 1) (sh) (Entered: 05/17/2002)

Scotts then filed a Rule 59(e) motion to alter or amend with regard to the $750,000.00 incentive award.

Central also filed a Rule 59(e) motion on grounds that are not clear. On September 30, 2002, the district court entered an Order and Amended Judgment which granted Central's motion. The district court's docket sheet shows the following entry:

> ORDER AND AMENDED JUDGMENT by Judge Edmund A. Sargus Jr granting motion to amend jgm [195-1];7,700,000 in favor of dft counter-plf Cen Gar against Scotts for breach of contract; $3,275,000 in favor of Cen Gar against Scotts for excess shipments; $750,000 in favor of Cen Gar against Scotts for breach of contract for incentive compensation; $350,000 in favor of Cen Gar against Scotts for MiracleGro, which yields a total award of $12,075,00 in favor of dft Cen Gar against plf Scotts as to all of Cen Gar's counterclaims (cc: all counsel) (no pgs: 3) (sh) (Entered: 09/30/2002)

The jury verdict amounts were not changed; however, the language describing the component parts was changed. There is no indication that the Amended Judgment was entered *nunc pro tunc* of the May 16, 2002 Judgment.

Subsequently, the district court granted Scott's motion to alter or amend and set aside the $750,000.00 award in favor of Central for lack of evidence.

Both parties also moved for prejudgment interest. The district court directed them to confer on the net amount of prejudgment interest they owed each other. After doing so, they agreed that "2,827,123.65 is the net amount of prejudgment interest that has accrues in favor of plaintiff Scotts though May 16, 2002." On September 22, 2003, the district court entered a Final Amended Judgment which awarded Scotts the full amount of the jury verdict ($22.5 million) and Central $11.325 million (reflecting the $750,000.00 reduction from the Rule 59(e) motion). It also awarded Scotts prejudgment interest through May 16, 2002 - the date of the original judgment on the jury's verdict. The district court awarded Scotts post-judgement interest from May 17, 2002 through the date of payment. There is no indication on the Final Amended Judgment that it was entered *nunc pro tunc* to May 16, 2002.

Despite the parties' agreement on prejudgment interest noted above, they disagreed as to the date through which prejudgment interest ran. Central argued that it stopped at the date of entry of the judgment on the jury verdict - May 16, 2002. Scotts argues that it accrued until a final appealable order was entered - the Final Amended Judgment on September 22, 2003. The district court held that the cut off date for post judgment interest was May 16, 2003.

On appeal, the Sixth Circuit reversed, finding that September 22, 2003 was the cut off date for prejudgment/post-judgment interest, explaining:

> Under 28 U.S.C. § 1961(a), which controls postjudgment interest in civil cases decided in the federal district courts, postjudgment "interest shall be calculated from the date of the entry of the judgment." The Supreme Court has interpreted this statute to require interest to run from the date of the entry of judgment by the court rather than from the date of the jury verdict. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990). This circuit has held that postjudgment interest can run "from the date of any judgment that is not entirely set aside." *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 429 (6th Cir. 1999).
>
> As the district court noted, the Ninth Circuit addressed an issue similar to the one that faces us here and held that postjudgment interest should accrue from the date of the final judgment. See *AT & T Co. v. United Computer Systems, Inc.*, 98 F.3d 1206, 1211 (9th Cir. 1996) (calculating postjudgment interest from the later of two possible dates of judgment, where the prejudgment interest was higher than the postjudgment interest, on the ground that "[w]here a prior judgment awarding damages has been vacated pursuant to the actions of an ultimately losing party, equitable principles favor calculating the interest in a manner that more fully compensates the prevailing party").

The district court attempted to distinguish AT & T by stating that "there is only one judgment in this case-the Rule 54(b) judgment entered on May 16, 2002."

This is incorrect. At least two judgments were entered after May 16, 2002, including a September 30, 2002 amended judgment and a September 22, 2003 final amended judgment. Several judgments were also entered before the jury verdict, but those judgments are not candidates for the date that postjudgment interest begins because the damages due were not sufficiently ascertained. Cf. *AT & T*, 98 F.3d at 1210.

The justification given by the Ninth Circuit for calculating postjudgment interest from the date of final judgment applies with equal force in the present case. Although both parties received jury awards, Scotts was clearly the "prevailing party." *Id.* at 1211. Scotts was awarded $22.5 million of its $23.8 million claim; Central was awarded only $12.075 million of the originally requested sum of $976 million (and this award was further reduced by the district court). Because the prejudgment-interest rate on all of the claims is substantially higher than the postjudgment-interest rate, the district court's decision to start postjudgment interest from the May 16, 2002 judgment on the jury verdict grants an unjustified benefit to Central as the losing party. This equitable imbalance could have been avoided if the district court had ruled that postjudgment interest did not begin until

> the September 22, 2003 final amended judgment. We therefore reverse the district court's ruling on this issue, and set the date at which postjudgment interest begins to run at September 22, 2003.

Scotts, 403 F.3d at 792-93.

Although the holding in *Scotts* might support a finding that the dividing line between pre-judgment and postjudgment interest should be January 20, 2004 - the date of the Final Judgment, there is no indication that the judgments in Scotts were entered *nunc pro tunc*. It is also noted that nothing in *Scotts* supports Venture's argument that the dividing line should be the date of the Federal Circuit's mandate.

Additionally, the rationale for the Sixth Circuit's holding in *Scotts* to move the date for starting post judgment interest was to avoid inequity. It cannot be said under the circumstances that it would be inequitable to use December 4, 2003 as the dividing line between pre and post-judgment interest. The Amended Judgment and Second Amended Final Judgment were both entered "*nunc pro tunc* December 4, 2003 for purposes of computing interest." This language clearly implies that the dividing line for pre and post-judgment interest has always been contemplated to be December 4, 2003. The litigation history of the prejudgment interest issue supports this date as the demarcation. Moreover, the issue before the Federal Circuit as to prejudgment interest was the start date, not the end date.

SO ORDERED.

Dated: October 30, 2007

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, October 30, 2007, by electronic and/or ordinary mail.

/Julie Owens
Case Manager, (313) 234-5160

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case Number: 99-75354

[Filed November 29, 2006]

VENTURE INDUSTRIES CORP., et al,

Plaintiff,

v.

AUTOLIV ASP, INC.,

Defendant.

Honorable Avern Cohn

SECOND AMENDED FINAL JUDGMENT IN A CIVIL CASE

- **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that the judgment be and hereby is entered in favor of

plaintiffs and against defendant in the AGGREGATE OF $34,482,413.84.

$27,567,001.00 - jury verdict
$ 6,902,251.00 - prejudgment interest
$ 13,161.84 - costs

Pursuant to Rule (77d), FRCivP
Copies have been mailed to:

the attorneys of record

Date November 29, 2006
nunc pro tunc December 04, 2003 for
purposes of computing interest

David Weaver, Clerk of Court

s/Julie Owens
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case Number: 99-75354

[Filed April 7, 2004]

VENTURE INDUSTRIES CORP., ET AL,

Plaintiff,

v.

AUTOLIV ASP, INC.,

Defendant.

Honorable Avern Cohn

AMENDED FINAL JUDGMENT IN A CIVIL CASE

- **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that the judgment be and hereby is entered in favor of

plaintiffs and against defendant in the AGGREGATE OF $33,459,134.84.

$27,567,001.00 - jury verdict
$ 5,878,972.00 - prejudgment interest
$ 13,161.84 - costs

Pursuant to Rule (77d), FRCivP
Copies have been mailed to:

John Anding and William Horton

Date April 7, 2004
NUNC PRO TUNC December 4, 2003
for purposes of computing interest

David Weaver, Clerk of Court

/s/
JUDY CASSADY Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 04-1486, 04-1488

[Filed August 7, 2006]

VENTURE INDUSTRIES CORPORATION, VEMCO, INC., PATENT HOLDING COMPANY, and LARRY J. WINGET,

Plaintiffs-Cross Appellants,

v.

AUTOLIV ASP, INC. (successor to Morton International, Inc.),

v.

Defendant-Appellant,

AUTOLIV , INCORPORATED,

Defendant.

Before LINN, DYK, and PROST, *Circuit Judges*.

PROST, *Circuit Judge*.

Venture Industries Corp. ("Venture") sued Autoliv ASP ("Autoliv") for breach of contract. The contract was a Supply Agreement that had been entered into as part of the settlement of previous litigation between Ventu re and Morton International ("Morton"), the predecessor in interest to Autoliv. The trial was complicated by the fact that aside from the breach of Supply Agreement claim, many other claims relating to other agreements resulting from the settlement had been stayed pending arbitration. In particular, claims arising from a Cross Licensing agreement were stayed including claims disputing who between Autoliv and Venture owned various technologies. This complication led to numerous evidentiary rulings relating to testimony addressing any technology ownership issue. As the district court did not err in these evidentiary rulings, we *affirm* the district court's rulings. Ultimately, the jury found that Autoliv had breached the Supply Agreement and Venture was awarded $27,576,001 in damages and $5,878,972 in resulting prejudgment interest. The district court did err in calculating the accrual date of prejudgment interest. In this case, the proper date to calculate prejudgment interest is the date of filing the complaint. We therefore *vacate* the district court's calculation of prejudgment interest and *remand* the case to re-calculate the prejudgment interest consistent with this opinion. Even though other claims remain pending in this suit, we have jurisdiction over this appeal because the district court entered judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the breach of contract claim.

I.

After the entry of final judgment, Autoliv filed a motion for a new trial pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The district court's denial of that motion is the subject of a separate appeal, which we also resolve today. *Venture Indus. Corp. v. Autoliv ASP, Inc.*, 457 F.3d 1322 (Fed. Cir. 2006). In the companion case, we vacate and remand as to Autoliv's request for a new trial pursuant to Rule 60(b)(3). *Id.*, at 1333-34. Our affirmance of the judgment below and our remand for the re-computation of interest in this case are, of course, subject to the outcome of the proceedings on remand in the companion case.

Autoliv is the successor in interest to the Automotive Safety Products Unit of Morton International, Inc. Morton was a 'tier one' supplier of safety restraint systems to the automotive industry meaning that it directly supplied safety restraint systems to car and truck manufacturers. Venture was, on the other hand, a 'tier two' supplier because it supplied components to 'tier one' suppliers. Venture custom molded plastics, including air bag covers. From 1990 to 1995, Venture supplied Morton with air bag covers.

In 1995, Venture sued Morton in the Eastern District of Michigan asserting that Morton had misappropriated intellectual property relating to air bag cover technology owned by Venture. Morton counter-claimed asserting ownership of the technology. On December 31, 1995, Morton and Venture settled the case by entering into a Settlement Agreement

containing two separate agreements: a Cross License Agreement and a Supply Agreement. The Cross License Agreement permitted each party to use the other's claimed technology. One relevant provision of the Cross License Agreement addressed the procedures for resolving any disputes arising from the Cross License Agreement:

> If a dispute arises between the parties relating to [the Cross License Agreement] they shall use the following procedure prior to either party's pursuing any other available remedy:
>
> . . .
>
> (b) If the dispute relates to the inventorship and/or ownership of Subject Technology or whether any particular Invention constitutes Subject Technology, or whether Subject Technology constitutes Solely or Jointly Owned Subject Technology, the dispute shall be submitted to binding arbitration . . . .

The other agreement that formed part of the settlement was the Supply Agreement. It allowed Venture to place bids on all of Morton's future air bag cover programs and provided that Venture would be awarded those contracts where Venture's bids were "reasonably competitive." The Supply Agreement stated that:

> (a) Morton shall give [Venture] the opportunity to quote on all of Morton's world wide future Cover programs awarded to it by its customers . . . *excluding, however,* such future cover programs (i) for which Morton has been directed by its customer to use a source other than

> [Venture] or has been directed by its customer not to use [Venture], (ii) for which [Venture], in Morton's reasonable judgment, does not have the capability at the time of quotation to meet their requirements for the particular program(s) under consideration; and (iii) which Morton has elected, in its sole discretion, to retain internally for manufacture by Morton itself.
>
> (b) All timely quotes received from [Venture] for programs described in subsection (a) above, shall be compared by Morton to quotes received from other established module cover suppliers for the same program(s). Provided [Venture's] quote is reasonably competitive (as determined in good faith by Morton taking in to account price, terms, quality, ability to meet qualification requirements and delivery dates and other objective factors related to competitiveness), it shall be awarded such program(s).

On November 3, 1999, Venture once again sued Morton and Autoliv as the successor in interest to Morton, alleging that they had breached the Supply Agreement and the Cross License Agreement and also alleging patent infringement and misappropriation of trade secrets. Of all the claims in the amended complaint, only the claim for the breach of the Supply Agreement was fully adjudicated. All remaining claims were either stayed or dismissed. In particular, as the Cross License Agreement contains a mandatory binding arbitration requirement, the claims that arose out of disputes over the Cross License Agreement have been stayed pending the outcome of arbitration. As the

claim for breach of the Supply Agreement did not arise from the Cross License Agreement, this claim was neither stayed nor taken up in the arbitration.

On October 23, 2003, prior to trial, Autoliv filed a motion in limine to exclude, inter alia, evidence referencing the earlier lawsuit, the resulting Settlement Agreement and the Cross License Agreement. It argued such evidence was irrelevant, unfairly prejudicial, and impermissible character evidence as the 1995 case and the Cross License Agreement has "no relevance and no relationship" to this case. On October 29, 2003, the district court held a pre-trial conference addressing, among other things, Autoliv's motion in limine. The district court ruled that Venture and Autoliv would prepare a stipulation of facts describing the facts leading to the formation of the Supply Agreement and stated that the stipulation "can be done in lieu of testimony, but I'm not going to shade the testimony and I'm not going to confine [Venture] to the four corners." The resulting stipulation of facts was read to the jury at the start of trial on November 4, 2003 and stated that

> between 1990 and 1995, Venture had a relationship with Morton under which Venture manufactured air bag covers which it sold to Morton. Next, in 1995, Venture and Morton had a falling out which resulted in Venture suing Morton. Next, on December 31, 1995, the lawsuit was settled. A component of the settlement was a supply agreement pursuant to which Morton agreed to permit Venture to bid on [some] of Morton's air bag cover programs . . . .

On the third day of trial, the district court re-visited the evidentiary issue and ruled on the scope of evidence that could be admitted regarding the settlement of the prior litigation. Along similar lines, on the fourth day of the trial, the district court again explained the type of evidence that could be admitted stating that "I think Venture is entitled to explain what the essence of the prior dispute was about so the jury can understand fully how that prior dispute was settled. All they know now is it was a dispute between Morton and Venture." Based on these evidentiary rulings, Venture introduced testimony relating to the origins of the Supply Agreement and relating to Venture's licensing practices with third party air bag suppliers. Autoliv moved to have the court issue a limiting instruction as to this testimony but the district court denied the motion. Autoliv also requested a specific jury instruction that placed the burden on Venture to establish that its quotes were reasonably competitive with the quotes from other suppliers but the district court declined to use Autoliv's jury instruction.

Ultimately, the case went to the jury and, on December 4, 2003, the jury found that Autoliv had breached the Supply Agreement with respect to thirty three of thirty eight air bag programs and it awarded Venture $33,459,135 in damages. That damage award included $5,878,972 in prejudgment interest where the interest was calculated from the date the damages were incurred.

Autoliv appeals the district court's evidentiary rulings, the district court's refusal to give a limiting instruction, and the district court's refusal to use

Autoliv's jury instruction. Venture cross-appeals the district court's failure to award prejudgment interest from the date of filing the complaint rather than from the date the damages accrued.

II.

As to the question of whether evidence was properly admitted at trial is a procedural question, the regional circuit law controls the issue. *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1390-91 (Fed. Cir. 2003). In the Sixth Circuit, a district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Beck v. Haik*, 377 F.3d 624, 636 (6th Cir. 2004). Jury instructions are reviewed "as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision." *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 72 (6th Cir. 1990). A district court's decision whether to use a party's jury instruction is reviewed for abuse of discretion. *Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445, 449 (6th Cir. 2000).

On appeal, Autoliv argues that the district court erred in three ways. First, it contends that Venture's references to technology ownership were prejudicial and should have been excluded. Second, once this evidence was admitted, Autoliv contends that the district court erred by refusing to give a limiting instruction covering the admitted evidence. Lastly, Autoliv argues that the trial court erred by refusing to use Autoliv's jury instruction.

A.

As to the initial evidentiary rulings, Autoliv argues that the district court improperly expanded its initial decision to limit technology evidence when it allowed two particular pieces of evidence. First, Autoliv objects to the testimony of Mr. Torakis who regarded the Supply Agreement as the quid pro quo for the Cross Licensing Agreement stating that "[Venture] wanted business, [Morton] wanted our ideas that was the deal." Autoliv also objects to the testimony of Mr. Winget who testified that third party suppliers like Toyota Gosei and TRW had paid Venture a license fee of fifty cents per air bag cover for Venture's technology. Autoliv contends that this testimony unfairly prejudiced Autoliv because evidence of a quid pro quo arrangement or of licensing payments suggests that Venture owned the air bag technology.

The district court was well within its discretion to allow testimony especially where it felt it was needed to illuminate central issues to the case provided that "the judge inform[s] the parties and give[s] them an opportunity to present evidence relating to the newly revived issue." *Huss v. King Co.*, 338 F.3d 647, 651 (6th Cir. 2003). It is clear from the record that where the district court revisited the scope of the testimony because it was necessary for the jury's understanding, it also allowed the parties recourse to adjust their litigation strategies regarding this testimony. For example, on November 6, 2003, the district court stated that

> at an earlier time in this case I made a ruling, and I don't know whether any part of it was

> reserved, that the supply agreement was a stand-alone agreement and excluded any evidence of the cross-license agreement or the settlement agreement of the litigation.
>
> Based on the testimony I've heard over the last two days, I think that ruling was too restrictive. I don't think this jury is capable of understanding the supply agreement . . . . I can't understand why anybody would enter into such an agreement without knowing that there was a lawsuit, there was a settlement of the lawsuit, and the settlement of that lawsuit included both the cross-license agreement, because it was a dispute over technology, and included the supply agreement . . . . [T]hat doesn't mean a wide-ranging inquiry can be made into it, but . . . on a limited basis, I will allow testimony on the settlement agreement and on the litigation . . . .

In response to this change, Mr. Horton, counsel for Autoliv asked, "Obviously the scope of this is now changing dramatically. I may want to call a witness regarding the cross-licensing agreement." The judge responded, "You can. You can do anything you want. In light of this ruling, if anyone wants to amend the witness list or the exhibit list, they can do so."

Second, Autoliv argues that, once evidence of technology ownership was admitted, the district court erred by not granting Autoliv's request for a limiting instruction as to the technology ownership evidence. We do not agree with Autoliv. Autoliv requested a limiting instruction that two exhibits, Plaintiff's Exhibits 129a and 130, were being introduced to

demonstrate Autoliv's ownership over the technology. As stated by the district court the exhibits were admitted to demonstrate Autoliv's manufacturing capabilities and included no "claim to proprietorship [and] no claim to ownership." We discern no clear error in the district court's refusal to give the limiting instruction.

Third, and lastly, as to the jury instruction, Autoliv argues that the district court erred by refusing to grant its more specific instruction which stated that Venture bore the burden of establishing that the exclusions in the Supply Agreement did not apply. "[A] district court's refusal to give a jury instruction constitutes reversible error if: '(1) the omitted instructions are a correct standard of the law; (2) the instruction is not substantially covered by other delivered charges; (3) the failure to give the instruction impairs the requesting party's theory of the case.'" *Webster v. Edward D. Jones & Co.*, 197 F.3d 815, 820 (6th Cir. 1999). The instruction that was read to the jury stated:

> Venture has the burden of proving each of the following propositions. First, that Venture performed all obligations required of it under the contract. Second, that Autoliv ASP failed to perform its obligations under the contract and breached the contract. Third, as a result of the breach of the contract, Venture was damaged. Autoliv ASP has the burden of proving it qualified for any exclusion set forth in the Supply Agreement which it maintains absolved it of an obligation under the Supply Agreement.

The district court also read the entirety of Section 2.2 of the Supply Agreement to the jury. That section detailed the requirements of each party and the circumstances and conditions under which Autoliv could have refused to award a cover program to Venture. Those sections of the Supply Agreement outline that programs could be excluded from the Supply Agreement under specific circumstances such as where a customer directs that a specific cover supplier be used rather than Venture. Under these circumstances, we conclude that the district court properly instructed the jury that Autoliv bore the burden of proving that the exclusions excused it from allowing Venture to bid on a contract. The district court did not abuse its discretion in rejecting Autoliv's proposed jury instruction.

Autoliv's arguments regarding the evidentiary and jury related rulings have been considered and are found to be without merit. We see no reason to disturb those rulings of the district court.

III.

In its cross-appeal, Venture argues that the district court erred by failing to award Venture prejudgment interest from the date of the filing of the complaint, regardless of the time the damages actually accrued. In particular, Venture argues that Michigan Compiled Laws section 600.6013 explicitly grants prejudgment interest from the time of filing of the complaint and that statute controls the grant of prejudgment interest in this case.

Prejudgment interest is neither unique to patent law nor any other subject matter specific to the Federal Circuit's jurisdiction. Therefore, in this case, the law of the Sixth Circuit applies. *See Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 855-56 (Fed. Cir. 1991). Statutory interpretation is reviewed de novo. *United States v. Thomas*, 211 F.3d 316, 319 (6th Cir. 2000). In the Sixth Circuit, the issue of prejudgment interest is governed by the law of the forum state, which, in this case is Michigan. The interpretation of a statute by a district court is reviewed de novo. *United States v. Thomas*, 211 F.3d 316, 319 (6th Cir. 2000).

Autoliv argues that prejudgment interest in this case should not be calculated from the time the complaint was filed. It cites to a portion of Michigan Compiled Laws section 600.6013(1) which states that

> [i]nterest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in section 6301.

But Autoliv relegates to a footnote the relevant information that under section 600.6301 the "future damages" discussed in section 600.6013 are "damages arising from personal injury." As this case is not one for damages for personal injury, the limits on prejudgment interest cited by Autoliv are irrelevant.

Instead, as has been held by the Sixth Circuit in a breach of contact case,

> [i]n Michigan, prejudgment interest is not discretionary as the statute provides in relevant part that "interest on a money judgment recovered in a civil action shall be calculated from the date of filing the complaint" and "shall be calculated on the entire amount of the money judgment, including attorney fees and other costs." The statute excepts from this proscription prejudgment interest on future damages for personal injuries.

Perceptron, Inc. v. Sensor Adaptive Mach., 221 F.3d 913, 922 (6th Cir. 2000) (citing Mich. Comp. Laws Ann. § 600.6013(6) (West Supp. 2000)). The Sixth Circuit in *Perceptron* further articulates that

> [w]e are convinced Michigan law requires that prejudgment interest be calculated in this case on the entire judgment from the date that the complaint was filed. The prejudgment interest statute is remedial in nature and is to be construed liberally in favor of the prevailing party. The purpose of awarding statutory prejudgment interest is not only to compensate the prevailing party for the delay in the use of the money, but also to offset the costs of bringing the action and to provide an incentive for prompt settlement. The statute must be applied in accordance with its plain terms.

Id. at 923 (citations omitted). In view of the arguments made, we agree with Venture that damages in this

case should have been calculated from the date the complaint was filed rather than when the damages accrued. *See also Ayar v. Foodland Distribs.*, 472 Mich. 713, 698 N.W.2d 875, 877 (2005) (finding the language of section 600.6013(8) "to be clear and unambiguous"); *Morales v. Auto-Owners Ins. Co.*, 469 Mich. 487, 672 N.W.2d 849 (2003) (holding that "the language of MCL 600.6013 unambiguously states that prejudgment interest is to be calculated from the date the complaint is filed").

IV.

In sum, we affirm the district court's rulings on the evidentiary and procedural issues, however, we conclude that the district court did err in calculating prejudgment interest. In this case, the proper date to calculate prejudgment interest is the date of filing the complaint. We, therefore, vacate the district court's calculation of prejudgment interest and remand the case to the district court to re-calculate the prejudgment interest consistent with this opinion, and subject to the outcome of the remand proceedings in the companion case.

APPENDIX H

UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

No. 05-1537

[Filed August 7, 2006]

VENTURE INDUSTRIES CORPORATION, Vemco, Inc., Patent Holding Company, and Larry J. Winget,

Plaintiffs-Appellees,

v.

AUTOLIV ASP, INC. (successor to Morton International, Inc.),

Defendant-Appellant.

and

Autoliv, Incorporated,

Defendant.

Appealed from: United States District Court for the Eastern District of Michigan

John E. Anding, Drew, Cooper & Anding, of Grand Rapids, Michigan, argued for plaintiffs-appellees. With him on the brief was *Thomas V. Hubbard*. Of counsel on the brief was *Richard W. McLaren, Jr.*, Welsh & Katz, Ltd., of Chicago, Illinois.

Peter G. Greene, Skadden, Arps, Slate, Meagher & Flom LLP, of New York, New York, argued for defendant-appellant. With him on the brief was *Cyrus Amir-Mokri*. Of counsel on the brief was *William H. Horton*, Cox, Hodgman & Giarmarco, P.C., of Troy, Michigan.

Before LINN, DYK, and PROST, *Circuit Judges*.

DYK, *Circuit Judge*.

Autoliv ASP, Inc. ("Autoliv") appeals the decision of the United States District Court for the Eastern District of Michigan denying Autoliv's motion for relief from judgment in favor of Venture Industries Corp., Vemco, Inc., Patent Holding Co., and Larry J. Winget (collectively "Venture"), pursuant to Federal Rule of Civil Procedure 60, sections (b)(2) and (b)(3). *Venture Indus. Corp. v. Autoliv ASP, Inc.*, No. 99-75354 (E.D. Mich. July 15, 2005) (Judge Avern Cohn).[1] We conclude that the district court did not err in denying Autoliv's request under Rule 60(b)(2), but that the district court erred in failing to address whether Venture's use at trial of financial statements

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[1] On August 4, 2005, the district court issued an opinion explaining its reasons for denying Autoliv's Rule 60(b) motion. *Venture Indus. Corp. v. Autoliv ASP, Inc.*, No. 99-75354 (E.D. Mich. Aug. 4, 2005) ("*Rule 60(b) Opinion*").

containing false information constituted "fraud, misrepresentation, or other misconduct" warranting relief under Rule 60(b)(3). Accordingly, we affirm in part, vacate in part, and remand.

BACKGROUND

This appeal presents the issue of whether the use of falsified information in financial statements by Venture's damages expert at trial entitles Autoliv to relief from judgment under either Rule 60(b)(2) or 60(b)(3) of the Federal Rules of Civil Procedure.

As part of the 1995 settlement of a patent dispute between Venture and Autoliv, Venture and Autoliv executed a supply agreement.[2] Under the supply agreement, Autoliv was obligated to purchase airbag covers from Venture so long as Venture was capable of filling the order and Venture's bids were "reasonably competitive" with the bids of other suppliers. In the period after 1995, Autoliv purchased some covers from Venture, but also acquired covers from other sources.

On November 3, 1999, Venture filed suit against Autoliv alleging that Autoliv breached the supply agreement with respect to 38 airbag cover projects either by not allowing Venture to bid on the projects or by rejecting Venture's reasonably competitive bids.

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[2] The supply agreement and two other agreements that were part of the settlement were executed by Venture and Morton International, Inc. (Autoliv ASP's predecessor in interest). Morton was acquired by and merged into Autoliv ASP in 1997. For convenience, we refer to both Morton International, Inc. and Autoliv ASP as "Autoliv."

Venture's complaint also stated several patent law claims, including claims for correction of inventorship, declaratory judgment of unenforceability of patents Autoliv claimed to own, and declaratory judgment of infringement of patents Venture claimed to own. These claims were stayed by the district court pending the outcome of arbitration of these claims as required by a cross-license agreement, also executed as part of the settlement of the 1995 litigation. Other claims relating to the supply agreement were either stayed by stipulation of the parties or voluntarily dismissed.[3] Discovery and other pretrial proceedings took place for the next several years.

Discovery proved to be contentious. For this reason, on March 5, 2002, the district court appointed a Special Master to oversee discovery. On November 14, 2002, Autoliv submitted to Venture the following request for production of documents:

> Please produce each and every one of Venture's monthly, quarterly, and annual internal and external financial statements for the years 1995 to the present, whether reviewed, compiled or audited, and all documents relied upon, referred to, consulted or generated in preparing such statements, including your general ledgers, subsidiary ledgers, accounts payable and

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[3] The other claims related to the supply agreement were for fraudulent inducement and misrepresentation, termination and cancellation of contract, accounting, unjust enrichment, and unfair competition. Venture also asserted claims for fraudulent inducement of the settlement of the 1995 litigation and misappropriation of trade secrets.

> receivable ledgers, trial balances, accountants' work papers, bank statements, check registers and bank records. The term financial statements shall include, but is not limited to your balance sheets, income statements, profit and loss statements, cash flow statements, statements of net worth, statements of retained earnings and all notes to such financial statements.

J.A. at 648. Autoliv also requested financial information regarding the relationship between Venture and its subsidiaries. Venture responded that these requests "lack[ed] foundation in that Defendants have never contended Plaintiffs' financial condition was the basis for withholding the award of any program." J.A. at 668. Unsatisfied, Autoliv filed a motion to compel further responses on January 27, 2003. On March 10, 2003, the Special Master denied Autoliv's motion, concluding that "[r]equests for financial information in this lawsuit are appropriate, but these requests are overbroad." *Rule 60(b) Opinion*, slip op. at 6 (quoting Special Master report and recommendation).

On April 9, 2003, Autoliv, seeking additional financial information, filed a motion to compel the depositions of representatives of Venture and two of its subsidiaries pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. On September 23, 2003, the district court orally denied Autoliv's motion, concluding that "[a]ll of [Venture's] financial statements, its annual statements and its quarterly statements and its monthly statements should be produced," but that Autoliv's proposed deposition topic

("the basis for [the deponent's] contention that Venture's bid on each [project] would have been reasonably competitive with those quotes submitted by others") was "actually asking for Venture's position in the litigation." *Id.* at 6-7. The district court explained: "I prefer to wait until the final pretrial statement is prepared and we see which witnesses Venture is going to offer and the nature of their testimony . . . and then if there's some basis for asking that because you don't already have that, that's okay . . . ." *Id.* at 7.

Autoliv did not challenge or seek reconsideration of either the Special Master's or the district court's discovery rulings. Autoliv also did not submit further requests for the documents or alert the district court to any further problems with the discovery of Venture's financial information.

On November 4, 2003, trial began in Venture's action against Autoliv for breach of the Supply Agreement. Venture's expert witness on damages at trial was Aron Levko. To calculate Venture's damages, Levko relied on financial information from a manufacturing facility in Grand Blanc, Michigan, operated by a Venture subsidiary, Vemco, Inc., which would have produced the airbag covers for the projects awarded to Venture under the supply agreement with Autoliv. Levko utilized Venture's actual bids, some third party bids, and two independent production cost studies commissioned by Venture in 1997 and 1998. The cost estimates in the bids on which Levko relied did not separate variable costs (*e.g.*, the costs of material and labor) from fixed costs (*e.g.*, general overhead). Levko needed to separate fixed from variable costs for two reasons: (1) In addition to

claiming lost profits, Venture claimed the right to recover the fixed costs attributable to the contracts; and (2) Levko needed to assign the correct amount of variable costs to the hypothetical bids he constructed for programs where no bid was submitted. To do this, Levko used the ratio of fixed to variable costs reflected in Grand Blanc's plant-wide financial statements.

In order to compute the material cost component of the variable costs, Levko needed to calculate the amount of the purchased raw material that would become unusable scrap. To verify the accuracy of the material (scrap) costs reflected in the bids, Levko compared the scrap rate reflected in the bids (15 percent), against the scrap rate discernable from actual production data (approximately 11 percent), and the scrap rate reflected in Grand Blanc's plant-wide financial statements (12.4 percent). To be conservative, Levko used the bid scrap rate of 15 percent in his calculations. Based on the bid data, Levko calculated a contribution margin of 25 percent.

On December 4, 2003, the jury found that Autoliv had breached the supply agreement and awarded Venture $27,576,001 in damages. The district court entered final judgment against Autoliv in the amount of the jury's verdict on January 20, 2004, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

During the discovery period, Venture filed for reorganization under the Bankruptcy Code. The bankruptcy court appointed Doeren Mayhew & Company, P.C. ("Doeren Mayhew"), a forensic accounting firm, to investigate certain aspects of Venture's financial condition, including

"inter-company, shareholder and related party transactions." *Rule 60(b) Opinion,* slip op. at 3.[4]

After the entry of final judgment in this case, on March 10, 2004, Doeren Mayhew issued a report stating that "Venture had suffered multi-million dollar damages as a result of fraudulent related party transactions." *Rule 60(b) Opinion,* slip op. at 3-4. This conclusion called into question the representations in Venture's firm-wide financial statements.

On March 25, 2004, Doeren Mayhew issued a second report concerning the results of its "preliminary investigation of potential accounting irregularities." J.A. at 583. The report focused on Vemco and the Grand Blanc facility.[5] As noted, the books and records of that facility had been used by Venture's damages expert at trial. Doeren Mayhew discovered

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[4] The scope of Doeren Mayhew's initial investigation included (1) investigating "related party transactions that have taken place with Venture for the six-year period, March 29, 1997 through March 28, 2003 . . . . to determine whether the transaction was considered on no less favorable terms to the Debtor than would be obtained if such transaction were an 'arms-length' transaction with a non-affiliated entity[,]" J.A. at 185; and (2) reviewing and identifying "preferential transfers to insiders or affiliated companies as defined by Code Section 547(b) of the United States Bankruptcy Code" during the twelve-month period preceding Venture's date of insolvency, May 28, 2002. J.A. at 187.

[5] Doeren Mayhew undertook this investigation after it was "notified in early March 2004 regarding potential accounting irregularities discovered by Venture's management at the company's Grand Blanc facility." J.A. at 583. The scope of the investigation was limited to the Grand Blanc facility's internal financial information.

"questionable accounting procedures and practices," a "[l]ack of proper accounting controls," and "potential accounting irregularities" and "errors," and concluded (1) that Grand Blanc's "material cost may have been understated by approximately $700,000 on a monthly basis" during 2003, and (2) that "Grand Blanc had overstated its inventory on its financial records as of December 31, 2002 and 2003 by $2,800,000 and $2,500,000 respectively." J.A. at 584-85, 588. These misstatements resulted from an employee's manipulation of entries in the Grand Blanc facility's computerized accounting system and were reflected in reports generated by that system, including Grand Blanc's plant-wide financial statements. Doeren Mayhew's second report also called into question Venture's firm-wide financial statements, insofar as those statements were based in part on the inaccurate Grand Blanc plant-wide financial statements.

On April 5, 2004, Venture filed a Securities and Exchange Commission Form 8-K disclosing the information in the Doeren Mayhew reports. As to the related-party transactions addressed in the March 10, 2004 Doeren Mayhew report, the 8-K stated that Venture had filed a lawsuit seeking "[r]ecovery of payments to one or more of Defendants aggregating in excess of [$300,000,000]," J.A. at 591, and that as a result of the related-party transactions, "financial information previously publicly reported by Venture Holdings as far back as at least 1998 is unreliable and should not be relied upon by investors." J.A. at 592. As to the Grand Blanc accounting issues addressed in the March 25, 2004 Doeren Mayhew report, the 8-K stated that "[i]nvestigation by [Venture] and Doeren Mayhew disclosed . . . [a]pparent understatement of payables at

the Grand Blanc facility during fiscal 2003 aggregating $8,000,000-$10,000,000 . . . [and] [o]verstatement of inventory at the Grand Blanc facility during fiscal 2002 and 2003 in the range of $2,500,000-$2,800,000." J.A. at 592.

The Doeren Mayhew investigation was not immediately called to the district court's attention by either party. On April 7, 2004, the district court entered an amended final judgment in the amount of $33,459,134.84, adding prejudgment interest to the jury award. Autoliv appealed to the United States Court of Appeals for the Sixth Circuit, which transferred the appeal to this court on July 16, 2004. On October 4, 2004, we stayed the appeal to allow Autoliv the opportunity to file with the district court a motion for a new trial pursuant to Rule 60(b) based on the Doeren Mayhew reports. Autoliv filed its Rule 60(b) motion on October 21, 2004. Autoliv argued that the falsified financial information identified in the Doeren Mayhew reports constituted: (1) newly discovered evidence that could have affected the outcome of the trial, entitling Autoliv to a new trial pursuant to Rule 60(b)(2); and (2) "fraud, misrepresentation, or other misconduct of an adverse party" during discovery and the trial, entitling Autoliv to a new trial under Rule 60(b)(3).

After conducting an evidentiary hearing at which Levko testified that Doeren Mayhew's conclusions had no effect on his trial testimony, the district court denied Autoliv's Rule 60(b) motion. As to Rule 60(b)(2), the district court concluded that Autoliv failed to prove that the newly discovered financial information would have had an effect on the jury's decision on damages.

As to Rule 60(b)(3), the district court held that Venture did not commit discovery misconduct by failing to produce financial information that Autoliv alleged would have disclosed the misrepresentations Doeren Mayhew uncovered in time for use at trial. Because the district court had earlier denied Autoliv's motions to compel such production, and Autoliv neither challenged those rulings nor requested further disclosures of internal financial information from Venture, the district court concluded that there had been no discovery misconduct. The district court did not address Autoliv's request for relief under Rule 60(b)(3) based on Levko's trial testimony.

Autoliv timely appealed from the district court's disposition of the Rule 60(b) issues.[6] Because Venture's complaint asserted claims under the patent laws, we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1). The ruling of a district court under Rule 60(b) is final and appealable pursuant to 28 U.S.C. § 1292. *Ashland Oil, Inc. v. Delta Prods. Corp.*, 806 F.2d 1031, 1032 (Fed. Cir. 1986). At oral argument, we requested supplemental briefing as to the legal standard applicable to Autoliv's Rule 60(b)(3) request.

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[6] We lifted the stay, allowing Autoliv's appeal from the jury verdict and final judgment (nos. 04-1486 and 04-1488) to proceed. In an opinion also issued today, we affirm the judgment on the merits, subject to the remand proceedings that we order in this appeal. As to Venture's cross appeal, we vacate the district court's award of prejudgment interest and remand to the district court. *Venture Indust. Corp., et al. v. Autoliv ASP, Inc.*, Nos. 04-1486, -1488, --- Fed.Appx. ----, 2006 WL 2252836 (Fed. Cir. August 7, 2006).

DISCUSSION

The denial of a motion for a new trial under Rule 60(b) is reviewed for abuse of discretion. *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998); *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991). "An abuse of discretion will be found if the district court relies on clearly erroneous findings of fact, improperly applies the law or uses an erroneous legal standard." *United States v. Chambers*, 441 F.3d 438, 455 (6th Cir. 2006).

We address Autoliv's Rule 60(b)(2) and Rule 60(b)(3) arguments separately.

I

As a threshold matter, we reject Venture's contention that Autoliv's motion was untimely. Rule 60(b) provides that motions "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Autoliv filed its Rule 60(b) motion on October 21, 2004, nine months after the entry of judgment on January 2[illegible], 2004. Though the district court accepted Autoliv's motion without comment, Venture argues here that the nine-month delay was unreasonable under Rule 60(b).

The Sixth Circuit has held that whether the time of filing a Rule 60(b) motion was reasonable "is dependent upon the facts in a case, including length and circumstances of delay in filing, prejudice to opposing party by reason of the delay, and circumstances warranting equitable relief." *In re*

G.A.D., Inc., 340 F.3d 331, 334 (6th Cir. 2003).[7] Here, Venture makes no colorable claim that it was prejudiced by Autoliv's delay. Further, Venture itself was likely under an obligation to promptly notify the district court of the inaccuracies in Levko's testimony. *See* Mich. R. Prof'l Conduct 3.3(a)(4), *adopted by reference* E.D. Mich. Local R. 83.22(b) ("If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."); *see also Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1205 (Fed. Cir. 2005) ("Once counsel became aware that highly material false statements had been made by a witness, in pleadings submitted to the court and in response to discovery requests . . . Schreiber and its counsel were under an obligation to promptly correct the record.").

Rule 60(b)(2) provides, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]" Fed.R.Civ.P. 60(b)(2) (West 2006). "In order to prevail on a Rule 60(b)(2) motion, a movant must demonstrate . . . that the evidence is material and controlling and clearly would have produced a different result if presented before the

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[7] One exception (not pertinent here) applies to Rule 60(b)(1) motions predicated upon alleged errors of law, for which the Sixth Circuit has held that the "reasonable time" is limited to the time for filing a notice of appeal. *Barrier v. Beaver*, 712 F.2d 231, 234-35 (6th Cir. 1983).

original judgment." *Good*, 149 F.3d at 423 (internal quotation marks, brackets, and citation omitted).

Autoliv argues that the Doeren Mayhew reports constitute newly discovered evidence that undercut the accuracy of Levko's testimony, entitling Autoliv to a new trial under Rule 60(b)(2). At the evidentiary hearing on Autoliv's motion, Levko testified in detail that Doeren Mayhew's findings had no effect on his assessment of Venture's damages because, in making his calculations, he did not rely primarily on information from the Grand Blanc facility's main accounting system or the plant-wide financial statements. Instead, he relied principally on information from the Grand Blanc facility's "bid" (or "quote") system. Both Levko and Autoliv's expert, Glenn Sheets, testified that the bid system was separate and independent from the accounting system and that the information from the bid system was not called into question by the Doeren Mayhew reports. The district court found that "Autoliv has not made out a case for a finding that had the accounting irregularities described in the March 25 Doeren Mayhew report been known prior to trial, Levko's opinion and conclusion on damages would have produced a different result at trial with regard . . . to damages." *Rule 60(b) Opinion*, slip op. at 18.

Autoliv insists that the district court, in making findings of fact and determinations of the weight and credibility of the evidence, rejected Autoliv's Rule 60(b)(2) motion based on the district court's own judgment rather than the probable effect of the evidence on the jury. We disagree. The district court expressly assessed the probable effect on the jury,

stating: "It cannot be said that if the jury was presented with the Doeren Mayhew reports . . . its decision on damages would have been any different." *Id.* at 20. The district court reviewed the factual record in the light of the newly discovered evidence and made findings as to the weight of that evidence to determine what the effect on the jury likely would have been. Analysis of the record is necessary to resolve a Rule 60(b)(2) request.[8]

Autoliv also challenges several of the district court's specific findings regarding the effect of the accounting irregularities on Levko's testimony. Autoliv questions the bid system information that Levko used primarily in calculating Venture's damages. The bid information was obtained from the Grand Blanc facility's separate bid system. The district court found that this information "was separate and independent from the Grand Blanc facility plant-wide financial data" implicated by the Doeren Mayhew reports, *id.* at 18, and "was specific and reliable." *Id.* at 10. Levko relied on Venture's bids on Autoliv projects that were submitted before 2002, whether accepted or not. For projects that Venture did not actually bid on, Levko created hypothetical bids using data from submitted bids and five third-party bids.

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[8] *See, e.g., Daniels v. Pipefitters' Ass'n Local Union No. 597*, 983 F.2d 800, 802-03 (7th Cir. 1993) ("[I]t is only logical that a district court weigh the credibility of evidence before granting or denying a Rule 60(b)(2) motion. Rule 60(b)(2) motions are decided by judges; not by juries. Credibility determinations are necessary to these decisions. To hold otherwise would mean that the district court would have to order a new trial no matter how incredible the new evidence.").

Autoliv points out that the erroneous Grand Blanc financials were the result of a "lack of proper accounting controls." J.A. at 588. It argues that because there were errors in the Grand Blanc facility's financial statements for 2002-2003, "[t]he only reasonable inference to be drawn . . . is that [Venture's accounting] controls were not appropriate during that earlier time period either." Reply Br. of Autoliv at 25. Autoliv contends that this inference undercuts the reliability of the pre-2002 bid data Levko used. The district court concluded, however, that "Levko's opinion on damages was grounded on bids that antedated December 31, 2001," and that "[t]here is no evidence to suggest that the accounting irregularities at the Grand Blanc facility . . . affected Venture's 1996-2001 financial statements." *Rule 60(b) Opinion*, slip op. at 20. We see no clear error in these factual conclusions.

Autoliv also contends that a new trial should have been granted because Levko relied, in some of his testimony, on the fact that the Grand Blanc facility's plant-wide financial statements were audited and therefore presumptively reliable. Levko testified at trial that the fact that Grand Blanc had independently certified plant-wide financial statements "tells me [that] what's being reported is fair . . . [and that] the internal controls are appropriate and adequate . . . ." *Rule 60(b) Opinion*, slip op. at 11 n. 4. At the Rule 60(b) hearing, the district court questioned Levko about whether having the information in the Doeren Mayhew reports concerning the Grand Blanc financial statements would have altered his trial testimony. Levko responded "I couldn't say that the certified

statements were accurate, but it wouldn't change my conclusions." J.A. at 130.

Autoliv contends that even if Levko's conclusions would have remained the same, these alterations to Levko's testimony might have "colored" the trial. While the district court's Rule 60(b) opinion did not expressly address this possibility, the district court specifically recognized it during the Rule 60(b) hearing, and we are convinced that the district court considered the question and rejected Autoliv's contention utilizing the Rule 60(b)(2) standard for prejudice. We see no error in that conclusion.

Although Autoliv agrees that the Grand Blanc accounting system was separate from the bid system, Autoliv argues that financial information directly called into question by Doeren Mayhew was utilized by Levko in two respects: (1) to determine the ratio of fixed to variable costs; and (2) to test the accuracy of the scrap rate reflected in the bids.

As to the first, Autoliv contends that Levko's separation of the fixed and variable costs was affected because Doeren Mayhew found that inventory was overstated and recommended a downward inventory adjustment. Levko explained that a downward inventory adjustment would increase the cost of sales to the Grand Blanc facility, potentially altering the ratio of fixed and variable production costs. Levko stated in an affidavit that Doeren Mayhew's findings did not affect his allocation of fixed and variable costs in the bid data because the inventory adjustment would not materially affect the ratio. The district court explained that of the $2.5 million inventory

adjustment, "$888,000 consisted of non-air bag inventory which had no effect on the cost of sales related to air bag covers. Of the $1.6 million dollar balance, approximately 25% could be attributed to the cost of sales of air bag cover products." *Rule 60(b) Opinion,* slip op. at 5. The district court concluded that, while Levko determined the fixed-to-variable cost ratio from Grand Blanc's plant-wide financial statements, "any change in the financial statements as a consequence of the Doeren Mayhew reports did not affect the allocation." *Id.* at 12. We see no error in this conclusion.

As to the scrap rate, Levko used a scrap rate of 15 percent in his calculations. He derived that scrap rate from the bid information. Levko checked the bid-based scrap rate against the plant-wide scrap rate reported in Grand Blanc's plant-wide financial statements. That figure was 12.4 percent. He nevertheless used the 15 percent rate from the bids in order to make his calculations conservative. Autoliv relies on the affidavit of Kevin Dages, an accounting consultant, to argue that the inventory adjustments recommended by the Doeren Mayhew reports would have resulted in increased scrap rates for 2002 and 2003. Levko testified, however, that even assuming the inventory adjustment, the plant-wide scrap rate (only partially attributable to airbag cover production) would increase to 13.4 percent, still well below the 15 percent rate Levko used. The district court explained in detail that it rejected Dages' analysis on the basis of several methodological flaws, including Dages' calculation of increases in "[p]roduction costs based on plant-wide financial data [which] does not particularize air bag production costs." *Rule 60(b) Opinion,* slip op. at 19.

The district court found that even after making the inventory adjustment called for by the Doeren Mayhew reports, "the plant-wide scrap rate would be 13.4%, still below the 15% rate Levko used," *id.* at 13, and thus concluded that the Doeren Mayhew reports' effect on the scrap rate would not have altered the jury's decision. We find no clear error in this determination. The district court also did not err in failing to consider the totality of the allegedly prejudicial evidence.

Clear error only exists if we are "'left with a definite and firm conviction that a mistake has been committed.'" *United States v. Monumental Life Ins. Co.*, 440 F.3d 729, 732 (6th Cir. 2006) (quoting *Alexander v. Local 496, Laborers' Int'l Union of N. Am.*, 177 F.3d 394, 402 (6th Cir. 1999)). Here, we are left with no such conviction. We conclude that the district court did not abuse its discretion in denying Autoliv's motion for a new trial pursuant to Rule 60(b)(2).

II

We now address Autoliv's Rule 60(b)(3) motion. Rule 60(b)(3) provides: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . ."

A

Autoliv argues that Venture engaged in discovery misconduct by withholding "Venture's non-public

financial information-the data that ultimately disclosed Venture's fraud." Autoliv's Rule 60(b) Motion at 2. Autoliv contends that Venture should have disclosed the information in response to Autoliv's document-production requests and through the deposition testimony of representatives of Venture and pertinent Venture subsidiaries. In particular, Autoliv contends that it was denied the opportunity to depose the controller at the Grand Blanc facility who, according to Doeren Mayhew, manipulated the accounting system to cause the misrepresentations in the financial statements.

Failure to produce material in response to legitimate discovery requests can constitute misconduct under Rule 60(b)(3). *Abrahamsen v. Trans-State Express. Inc.*, 92 F.3d 425, 428 (6th Cir. 1996).[9] However, the question is not whether Venture failed to comply with Autoliv's initial discovery requests; it is whether Venture complied with Autoliv's requests as limited by the Special Master and the district court. There is no contention that Venture failed to comply with the discovery ordered by the district court. As the district court stated, "Autoliv had ample opportunity to ask the Court to require further of Venture if it felt that its discovery requests [were] not being met." *Rule 60(b) Opinion*, slip op. at 7. Autoliv did not request further action from the district court in this regard. We conclude that the district

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[9] *See also Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004); *Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 955 (10th Cir. 2004); *Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir. 1994); *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978).

court did not abuse its discretion in holding that Venture did not engage in discovery misconduct within the meaning of Rule 60(b)(3).[10]

B

We now turn to Autoliv's contention that reliance on the financial statements by Venture's damages expert warrants relief under Rule 60(b)(3). As a threshold matter, Venture insists that Autoliv failed to raise this ground before the district court. Based on our examination of the record, we conclude that the issue was properly raised in Autoliv'sRule 60(b)(3) motion.

Autoliv's contention here is based on the same grounds as its request under Rule 60(b)(2): (1) Levko's reliance on the bid data; (2) Levko's testimony that the Grand Blanc facility's certified financial statements gave him comfort about Venture's accounting controls; and (3) Levko's reliance on the Grand Blanc plant-wide financial statements to derive the fixed/variable cost ratio and check the bid-based scrap rate for his damage calculations.

The district court did not address Autoliv's Rule 60(b)(3) contention with respect to Levko's testimony. The district court did, however, hold that Autoliv failed to establish prejudice according to the Rule 60(b)(2) standard. Thus, even if Autoliv could establish fraud, misrepresentation, or other misconduct, the

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[10] We note that Autoliv does not contend that Venture engaged in any misconduct in opposing the discovery requests.

district court's failure to address Autoliv's Rule 60(b)(3) contention as to Levko's testimony could only constitute harmful error if the standard for prejudice under Rule 60(b)(3) is different from the standard for prejudice under Rule 60(b)(2). We conclude that the standard for prejudice is indeed different under the two rules, and thus that the district court's error was potentially harmful.

At oral argument, we requested supplemental briefing from both parties addressing the appropriate standard for relief under Rule 60(b)(3) in the Sixth Circuit. Venture argues that the issue is controlled by the Sixth Circuit's decision in *Abrahamsen*. While the court stated that relief is appropriate where a witness testifies falsely and "without [the false testimony], a jury might have reached a different conclusion," *Abrahamsen*, 92 F.3d at 428 (internal quotation marks omitted), the court did not clearly articulate a general standard for determining prejudice.[11] Nor does any other published Sixth Circuit decision.

Autoliv contends that the appropriate rule is stated in *Jordan v. Paccar, Inc.*, No. 95-3478, 1996 WL 528950 (6th Cir. 1996), an unpublished decision. In the Sixth Circuit, only published decisions are binding on the court;[12] unpublished decisions may be persuasive

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[11] Prejudice was obvious in *Abrahamsen* because the district court expressly held that it would not have found the plaintiffs contributorily negligent absent the false testimony. *Id.* at 428-29.

[12] *United States v. Wood*, 364 F.3d 704, 725 (6th Cir. 2004); *S.J. v. Hamilton County, Ohio*, 374 F.3d 416, 423 n. 5 (6th Cir. 2004); *Sheets v. Moore*, 97 F.3d 164, 167 (6th Cir. 1996); *see also* Sixth

authority depending on their pertinence and depth of reasoning. *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 205 n. 3 (6th Cir. 2004).[13] Autoliv urges that we should rely on *Jordan* because the court in *Jordan* thoroughly analyzed the question of the proper legal standard under Rule 60(b)(3). *See* 1996 WL 528950, at *6-*9. We agree. The court in *Jordan* set forth the legal standard applicable under Rule 60(b)(3) based on thorough analysis of the language of the rule and its treatment by other circuits. Thus, we conclude that relying on *Jordan* is appropriate under the circumstances.

In some circuits, the standard for prejudice under Rule 60(b)(3) requires the movant to demonstrate that the fraud or misconduct "prevented the moving party from fully and fairly presenting his case." *Schultz*, 24 F.3d at 630; *see also Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 (1st Cir. 1988).[14] The Sixth Circuit in

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Cir. R. 206(c) ("Reported panel opinions are binding on subsequent panels.").

[13] *See also* Sixth Cir. R. 28(g) (citation of unpublished opinions is "disfavored," but permissible "[i]f a party believes . . . that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well . . . ."); *Oviedo v. Jago*, 809 F.2d 326, 329 n. 3 (6th Cir. 1987) (relying on unpublished decision because "the panel's reasoning [is] sound and its decision supported by the existing law").

[14] *See also Cummings*, 365 F.3d at 955; *Sellers v. Mineta*, 350 F.3d 706, 715 (8th Cir. 2003); *Tobel v. City of Hammond*, 94 F.3d 360, 362 (7th Cir. 1996); *Diaz v. Methodist Hosp.*, 46 F.3d 492, 496 (5th Cir. 1995); *In re M/V Peacock*, 809 F.2d 1403, 1404-05 (9th Cir.

Jordan, however, "dispens[ed] with any requirement that the moving party demonstrate prejudice," *Jordan*, 1996 WL 528950, at *8, holding that "prejudice should be presumed[ ] once the moving party has shown by clear and convincing evidence that misbehavior falling into one or more of the three categories set out in Rule 60(b)(3) has occurred." *Id.* The burden then shifts to the non-moving party "to demonstrate by clear and convincing evidence that the misbehavior which occurred had *no prejudicial* effect on the outcome of the litigation." *Id.*

As we noted earlier, under Rule 60(b)(2) the *moving party* must show that the newly discovered evidence, if introduced at trial, "clearly would have produced a different result if presented before the original judgment." *Good*, 149 F.3d at 423. The prejudice standards of Rule 60(b)(3) and Rule 60(b)(2) thus differ as to the party that initially bears the burden of proof, and as to the nature of the necessary showing. The district court analyzed the possibility of prejudice from Levko's testimony only under the Rule 60(b)(2) standard.[15] It did not apply the standard for prejudice

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1987); *Stridiron*, 698 F.2d at 207; *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 371 (D.C. Cir. 1981).

[15] "Autoliv has not made out a case for a finding that had the accounting irregularities described in the March 25 Doeren Mayhew report been known prior to trial, Levko's opinion and conclusion on damages would have produced a different result at trial with regard . . . to damages." *Rule 60(b) Opinion*, slip op. at 18; *see also id.* at 20 ("It cannot be said that if the jury was presented with the Doeren Mayhew reports, particularly the March 25 Doeren Mayhew report, its decision on damages would have been any different.").

that we conclude is applicable to Autoliv's Rule 60(b)(3) request with respect to Levko's testimony.

We conclude that we must vacate in part the district court's denial of Autoliv's Rule 60(b)(3) motion as it concerned Levko's testimony and remand for adjudication under the proper legal standard. In doing so, we do not address the question of whether Levko's testimony constitutes "fraud, misrepresentation, or other misconduct" within the purview of Rule 60(b)(3); that is a question best addressed by the district court in the first instance.[16] On remand, the district court must decide whether Autoliv has established, by clear and convincing evidence, that reliance upon Venture's financial information by Venture's damages expert constituted fraud or misrepresentation. If Autoliv makes such a showing, the district court must consider whether Venture established, by clear and convincing evidence, that the misbehavior had *no* prejudicial effect on the outcome of the litigation.

III

In summary, we affirm the district court's denial of Autoliv's motion for a new trial pursuant to Rule

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[16] In this connection, we do not decide-one way or the other-whether, as the district court correctly held in connection with the alleged discovery misconduct issue, "there is no evidence that Venture was aware of the accounts payable understatement or inventory overstatement that Doeren Mayhew describes . . . in its March 25 report." *Rule 60(b) Opinion*, slip op. at 8. We have rejected the discovery argument on a different ground-that the failure to produce documents that would reveal the fraud was not misconduct.

60(b)(2). We also affirm the district court's conclusion that Autoliv is not entitled to a new trial under Rule 60(b)(3) on the basis of discovery misconduct. But because the district court did not consider Autoliv's allegation with respect to Levko's testimony as a ground for relief under Rule 60(b)(3), we vacate the district court's denial of Autoliv's Rule 60(b)(3) motion and remand for further proceedings consistent with this opinion.

CONCLUSION

The decision of the district court is

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

COSTS

No costs.

APPENDIX I

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 2007-1118

[Filed July 11, 2007]

VENTURE INDUSTRIES CORPORATION, Vemco, Inc., Patent Holding Company, and Larry J. Winget,

Plaintiffs-Appellees,

v.

AUTOLIV ASP, INC. (successor to Morton International, Inc.),

Defendant-Appellant.

Appealed from United States District Court for the Eastern District of Michigan, No. 2:99-CV-75354, Avern Cohn, Senior Judge.

John E. Anding, Drew, Cooper & Anding, of Grand Rapids, MI, argued for plaintiffs-appellees. With him on the brief was *Thomas V. Hubbard*.

Peter E. Greene, Skadden, Arps, Slate, Meagher & Flom LLP, of New York, NY, argued for defendant-appellant. With him on the brief was *Cyrus Amir-Mokri*.

Judgment

ON APPEAL from the United States District Court for the Eastern District of Michigan

in CASE NO(S). 2:99-CV-75354

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (LINN, and PROST, *Circuit Judges*, CLEVENGER, *Senior Circuit Judge*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED: July 11, 2007

/s/ Jan Horbaly
Jan Horbaly, Clerk

APPENDIX J

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V--PROCEDURE
CHAPTER 125--PENDING ACTIONS AND JUDGMENTS

28 U.S.C.A. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding.[1] the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this

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[1] So in original. The period probably should not appear.

title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1986.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit,[2] at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

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[2] So in original. Probably should be "Circuit,".

Michigan Compiled Laws

Chapter 600. Revised Judicature Act of 1961

M.C.L.A. Sec. 6013. (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in section 6301.

(2) For complaints filed before June 1, 1980, in an action involving other than a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment is calculated from the date of filing the complaint to June 1, 1980, at the rate of 6% per year and on and after June 1, 1980, to the date of satisfaction of the judgment at the rate of 12% per year compounded annually.

(3) For a complaint filed before June 1, 1980, in an action involving a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. However, the rate after the date judgment is entered shall not exceed either of the following:

(a) Seven percent per year compounded annually for a period of time between the date

judgment is entered and the date of satisfaction of the judgment that elapses before June 1, 1980.

(b) Thirteen percent per year compounded annually for a period of time between the date judgment is entered and the date of satisfaction of the judgment that elapses after May 31, 1980.

(4) For a complaint filed on or after June 1, 1980, but before January 1, 1987, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually unless the judgment is rendered on a written instrument having a higher rate of interest. In that case interest is calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not

resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).

(7) For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

(8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is

retained by the plaintiff, and not paid to the plaintiff's attorney.

(9) If a bona fide, reasonable written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered and is rejected by the plaintiff, the court shall order that interest is not allowed beyond the date the bona fide, reasonable written offer of settlement is filed with the court.

(10) Except as otherwise provided in subsection (1) and subject to subsections (11) and (12), if a bona fide, reasonable written offer of settlement in a civil action based on tort is not made by the party against whom the judgment is subsequently rendered, or is made and is not filed with the court, the court shall order that interest be calculated from the date of filing the complaint to the date of satisfaction of the judgment.

(11) If a civil action is based on medical malpractice and the defendant in the medical malpractice action failed to allow access to medical records as required under section 2912b(5), the court shall order that interest be calculated from the date notice was given in compliance with section 2912b to the date of satisfaction of the judgment.

(12) If a civil action is based on medical malpractice and the plaintiff in the medical malpractice action failed to allow access to medical records as required under section 2912b(5), the court shall order that interest be calculated from 182 days after the date the complaint was filed to the date of satisfaction of the judgment.

(13) Except as otherwise provided in subsection (1), if a bona fide, reasonable written offer of settlement in a civil action based on tort is made by a plaintiff for whom the judgment is subsequently rendered and that offer is rejected and the offer is filed with the court, the court shall order that interest be calculated from the date of the rejection of the offer to the date of satisfaction of the judgment at a rate of interest equal to 2% plus the rate of interest calculated under subsection (8).

(14) A bona fide, reasonable written offer of settlement made according to this section that is not accepted within 21 days after the offer is made is rejected. A rejection under this subsection or otherwise does not preclude a later offer by either party.

(15) As used in this section:

(a) "Bona fide, reasonable written offer of settlement" means either of the following:

(*i*) With respect to an offer of settlement made by a defendant against whom judgment is subsequently rendered, a written offer of settlement that is not less than 90% of the amount actually received by the plaintiff in the action through judgment.

(*ii*) With respect to an offer of settlement made by a plaintiff, a written offer of settlement that is not more than 110% of the amount actually received by the plaintiff in the action through judgment.

(b) "Defendant" means a defendant, a counter-defendant, or a cross-defendant.

(c) "Party" means a plaintiff or a defendant.

(d) "Plaintiff" means a plaintiff, a counter-plaintiff, or a cross-plaintiff.

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.: 99-75354

[Filed March 1, 2004]

VENTURE INDUSTRIES CORPORATION, et al.,	)
Plaintiffs,	)
v.	)
AUTOLIV ASP, INC., successor to MORTON INTERNATIONAL, INC.; AUTOLIV, INC., and MORTON INTERNATIONAL, INC.,	)
Defendants.	)

HON. AVERN COHN
MAGISTRATE JUDGE WALLACE CAPEL

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NOTICE OF APPEAL

Notice was given that Defendant Autoliv ASP, Inc., appeals to the United States Court of Appeals for the Sixth Circuit from the Final Judgment entered by the Clerk of the Court in this action on January 29, 2004

and the Memorandum and Order Denying Defendant's Motion for Judgment as a Matter of Law entered in this action on February 12, 2004.

COX, HODGMAN & GIARMARCO, P.C.

By: /s/

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Dated: March 1, 2004

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 99-75354

[Filed March 16, 2004]

VENTURE INDUSTRIES CORPORATION, VEMCO, INC., PATENT HOLDLING COMPANY, and LARRY J. WINGET,

Plaintiffs / Cross-Appellants

v.

AUTOLIV ASP, INC., and AUTOLIV, INC.,

Defendants / Cross-Appellees.

Judge Avern Cohn
Magistrate Judge Wallace Capel, Jr.

John E. Anding (P30356)
Bridget C. Kehoe (P28196)
Thomas V. Hubbard (P60575)
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NOTICE OF FILING CROSS APPEAL

Notice is hereby given that all Plaintiffs in the above named case cross appeal, pursuant to Federal Rule of Appellate Procedure 4(a)(3), to the United

States Court of Appeals for the Sixth Circuit[1] from the Order granting Defendant Autoliv, Inc.'s Motion for Summmary Judgment as to Counts II (Breach of Supply Agreement - Autoliv, Inc.), IV (Breach of Cross License Agreement - Autoliv, Inc.) and V (Abondonment of Supply Agreement, Cross License Agreement and Settlement Agreement) of Plaintiffs' Second Amended Complaint, entered in this action on May 20, 2003.

Respectfully Submitted,

DREW, COOPER & ANDING
Attorneys for Plaintiffs/Cross-Appellants

By: /s/
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Thomas V. Hubbard (P60575)
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Grand Rapids, MI 49503
(616) 454-8300

Dated: March 12, 2004

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[1] This Notice of Cross Appeal may not be construed as an acceptance by Plaintiffs of the Sixth Circuit's jurisdiction over this appeal. Plaintiffs intend to file with the Sixth Circuit a Motion to Transfer this appeal to the Court of Appeals for the Federal Circuit because of patent claims pleaded in Plaintiffs' Second Amended Complaint.

APPENDIX M

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-2457

[Filed December 4, 2007]

VENTURE INDUSTRIES CORPORATION,

Plaintiff-Appellant,

VEMCO INC.; PATENT HOLDING COMPANY; LARRY J. WINGET,

Plaintiffs,

v.

AUTOLIV ASP, INC., successor to Morton International, Incorporated; AUTOLIV, INC.,

Defendants-Appellees.

ORDER

In this patent action, the plaintiff filed a notice of appeal to the United States Court of Appeals for the Federal Circuit on November 15, 2007. The appeal was

inadvertently transmitted to and docketed in this court. The appeal is hereby *sua sponte* **TRANSFERRED** to the United States Court of Appeals for the Federal Circuit.

ENTERED PURSUANT TO RULE 45
SIXTH CIRCUIT RULES

Leonard Green, Clerk

/s/ Leonard Green ji

APPENDIX N

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 04-1486, -1488

[Filed August 28, 2006]

VENTURE INDUSTRIES CORPORATION, VEMCO INC., PATENT HOLDING COMPANY, and LARRY J. WINGET,

Plaintiffs-Cross Appellants,

v.

AUTOLIV ASP, INC., (successor to Morton International, Inc.),

Defendant-Appellant,

v.

AUTOLIV, INCORPORATED,

Defendant.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan

CASE NO.: 2:99-CV-75354

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED-IN PART, VACATED-IN-PART and REMANDED.

ENTERED BY ORDER OF THE COURT

DATED AUG 7, 2006

/s/ Jan Horbaly /lms
Jan Horbaly, Clerk

ISSUED AS A MANDATE: AUG 28, 2006

[Opinion omitted here, contained in this appendix at page 28a]

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 99-75354

[Filed October 10, 2007]

VENTURE INDUSTRIES CORPORATION, VEMCO INC., PATENT HOLDING COMPANY, and LARRY J. WINGET,

Plaintiffs,

v.

AUTOLIV ASP, INC., and AUTOLIV, INC.,

Defendants.

Honorable Avern Cohn
Magistrate Wallace Capel

John E. Anding (P30356)
Thomas V. Hubbard (P60575)
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PLAINTIFF'S MOTION TO DETERMINE PREJUDGMENT INTEREST EXPEDITED CONSIDERATION REQUESTED

Plaintiff Venture Industries, Inc. ("Venture") respectfully moves this Court for an assessment of prejudgment interest, pursuant to M.C.L. § 600.6013(8), in the amount of $13,525,577.00 *non pro tunc* September 27, 2007. This amount reflects prejudgment interest on the verdict in Venture's favor of $27,500,001.00 calculated from November 3, 1999 through September 27, 2007.

Venture states, in further support of its Motion:

1. Michigan's prejudgment interest statute, M.C.L. § 600.6013(8) applies in this case because, in federal diversity actions, the law of the forum state governs prejudgment interest. *Perceptron, Inc. v. Sensor Adaptive Machines, Inc.*, 221 F.3d 913, 922 (6th Cir. 2000); *Venture Indus. Corp. v. Autoliv ASP, Inc.*, Nos. 04-1486, 04-1488, 2006 WL 2252836, at **6 (Fed. Cir. Aug. 7, 2006).

2. Under Michigan law, prejudgment interest accrues beginning with the filing of the complaint, through the conclusion of any appeal. *Morales v. Auto-Owners Ins. Co.*, 469 Mich. 487, 491-92 (2003); *Ayar v. Foodland Distributors*, 472 Mich. 713, 716-17 (2005).

3. The Complaint in this case was filed on November 3, 1999. The latest appeal in this case concluded on September 27, 2007, the date the Federal Circuit's Judgment was issued as a Mandate.

4. In a pre-motion telephone conference, the Court stated that it would consider and resolve this matter as expeditiously as possible.

WHEREFORE, for the reasons set forth above and in the accompanying Memorandum in support of this Motion, Venture respectfully requests that: 1) this court assess prejudgment interest totaling $13,525,577.00 against Autoliv and in favor of Venture, reflecting a calculation of prejudgment pursuant to M.C.R. § 600.6013(8) beginning on November 3, 1999 and ending September 27, 2007; 2) this Court exercise its discretion and set this Motion for hearing within the next ten (10) days.

Respectfully submitted,

DREW, COOPER & ANDING
Attorneys for Plaintiffs

/s/ John E. Anding
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Dated: October 10, 2007